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Supreme Court of the United States

DAYTON HUDSON CORPORATION, NOW KNOWN AS TARGET CORPORATION,

Petitioner,

vs

LAURA HOLLISTER,
AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, on a petition for rehearing, a federal court violates the constitutionally mandated rule of *Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)*, when it disregards relevant holdings of the highest state court and other available sources of state law and adopts a rule of state law that had been expressly rejected by the highest state court.

2. Whether, on a petition for rehearing, a court of appeals can reverse the judgment based upon new evidence not part of the district court record.

3. Whether, on a petition for rehearing, a court of appeals can reverse the judgment based on an issue never raised by the parties without requesting briefing from the party opposing the petition.

4. Whether this Court should adopt uniform guidelines to aid federal courts in determining and applying state law.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Dayton Hudson Corporation, now known as Target Corporation, is a corporation with no parent corporation and no publicly held company that owns 10% or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dayton Hudson Corporation, n/k/a Target Corporation, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The original opinion of the Court of Appeals for the Sixth Circuit is reported at 188 F.3d 414 and is reprinted with the court's order in the Appendix at pages 22a-1 to 22a-16. The amended opinion is reported at 201 F.3d 731 and is reprinted with the court's order in the Appendix at pages 1a to 22a. The opinion and order of the United States District Court for the Eastern District of Michigan is reported at 5 F. Supp. 2d 530 and is reprinted in the Appendix at pages 23a to 46a. The opinion and order denying the petitions for rehearing is reprinted in the Appendix at pages 47a to 48a.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on January 13, 2000. The order denying Dayton Hudson's timely petition for rehearing was entered March 2, 2000. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual

service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 2072 provides:

2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

STATEMENT OF THE CASE

This case concerns fundamental concepts of federalism, the power of federal courts, and the appropriate procedure for ascertaining state law. On rehearing, the Sixth Circuit reversed its earlier affirmance of a district court's summary judgment and, without conducting a principled review of state law under *Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)*, developed a theory of liability that had been expressly rejected by Michigan courts. The Sixth Circuit based its decision on evidence outside of the record that was crafted in response to its first opinion. It did so without giving Petitioner Dayton Hudson Corporation ("Hudson's") notice or an opportunity to be heard.

There is currently no uniform, principled approach for the federal courts to determine state law. "[N]either *Erie* nor any subsequent Supreme Court pronouncements have provided a definitive answer to the related question – how to resolve legal issues that have not been squarely decided by the highest court of the relevant jurisdiction." Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DePaul L. Rev. 1, 3 (1988). In the over sixty years since this Court decided *Erie*, federal courts have struggled with this kind of determination. As a result, "particular difficulties inherent in federal determination of state substantive law persist." *Id.* at 2.

These difficulties blur the meaning of *Erie*. The principle of *Erie* is well settled: it secures fundamental federalism by protecting state citizens from inconsistent treatment at the hands of federal courts sitting in diversity. The *Erie* doctrine protects against an overpowering federal government punishing or favoring state citizens contrary to state law. But without established guidelines, this doctrine means little in practice where, as here, a court chooses to ignore plain precedent and devise its own rule of law.

Established as principle, the *Erie* doctrine lacks a uniform approach to determining and applying state law.

Litigants in different courts, even within the same district, have no guarantee that their substantive rights will be determined consistently with similarly situated litigants in other courtrooms, whether federal or state. The need for a uniform approach is highlighted in the present case where the court of appeals failed to even address the myriad of decisions expressly rejecting the strict liability rule of law that it embraced. The failure of the court to address these decisions led to a treatment materially inconsistent with similarly situated litigants within the forum state. This case seeks a uniform approach to determining the content of state law that will prevent this type of unprincipled decision and ensure a fair administration of equal justice for all litigants throughout the federal system.

This case also seeks an explication for the scope and procedure of appellate rehearings. It seeks clarification whether a court of appeals conducting a *de novo* review of a district court's ruling may consider new evidence that is not part of the record. Finally, it seeks clarification whether the court can decide, on an incomplete record, issues not raised by the parties without notice and an opportunity to be heard.

A. THE ACCIDENT

In the early morning hours of November 5, 1995, Plaintiff, a Michigan resident, was injured in a mysterious fire at her apartment. (App. at 3a.) The circumstances of the fire are unknown as she has no memory of it and there were no eyewitnesses. (*Id.*) Based upon remnants recovered from the scene, at the time of the fire Plaintiff was wearing a rayon blouse of unknown manufacture, a Banana Republic t-shirt, a Victoria's Secret bra, and nothing else. (*Id.* at 4a.) She claims that the fire started when her blouse came in contact with a hot stove burner. (*Id.*)

The main focus of the case is the blouse. Plaintiff's mother claims she bought the blouse at one of two Hudson's stores in the fall of 1988 or 1989. (*Id.*) Hudson's, a

Minnesota corporation with its principal place of business in Minnesota, is a medium-to-large-size retailer of brand-name clothing and other products. Plaintiff never disclosed sufficient information for Hudson's, which sells thousands of products from different manufacturers, to identify the manufacturer of the blouse or to verify whether it even sold the blouse.

B. DISCOVERY AND THE DISTRICT COURT ACTION

On March 25, 1996, Plaintiff filed the present action in Michigan state court naming Ralph Lauren, Banana Republic, Victoria's Secret, General Electric and Hudson's. (App. at 5a.) General Electric removed the matter on diversity grounds. (*Id.* at 6a.) Before the close of discovery, Plaintiff voluntarily dismissed all but Hudson's, leaving a two-count complaint, charging negligence and breach of implied warranty.[1] (*Id.* at 8a.) Under each of these theories, she claimed that the blouse was unreasonably flammable and that it should have carried a warning about its flammability. (*Id.*)

Throughout discovery Plaintiff focused on her allegation that the blouse was defectively designed because it was "unreasonably flammable." Beyond denying recollection of the content of anything but the "dry-clean only" label, she produced no evidence to support her failure-to-warn claim. None of her proffered experts offered an opinion about the necessity for a warning. (J. A. at A0829-44.) None of the experts identified or discussed a sample warning. (*Id.*)

At the close of discovery, Hudson's filed numerous motions, including three separate motions for summary

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[1] Michigan uses the term "implied warranty" as a type of product liability action without reference to its usually understood meaning within the context of the U.C.C. Throughout this brief, Hudson's will refer to failure to warn and negligent design as "claims" and implied warranty and negligence as "theories."

judgment directed to Plaintiff's claims of design defect. (App. at 22a-6.) Plaintiff responded to the motions by attempting to supplement her expert's testimony with a burner "test."[2] (Def.-Appellee Br. on Appeal at 15.) In addition, she attempted to resurrect her warnings claim. Rather than asserting that a warning would have allowed her to safely use the product (i.e., a traditional claim of failure to warn), however, she argued that a warning would have prevented the use of the product altogether. (Def.-Appellee Combined Pet. for Reh'g at 13 n.8.) Because both claims challenged the utility of the blouse based upon its flammability, her claim of failure to warn was virtually identical to her other claim of design defect. (*Id.*)

Throughout her briefs, Plaintiff treated her failure-to-warn claim as a single cause of action. (Br. of Pl.-Appellant at 46-50.) She never asserted that this claim should have been judged separately under negligence and implied warranty theories. (*Id.*) She reconfirmed this position in the Joint Pretrial Order by identifying in the issues-of-law section only a single claim of negligent failure to warn. (Def.-Appellee Combined Pet. for Reh'g at Ex. D.)

On May 12, 1998, the district court issued a written opinion granting Hudson's motion. (App. at 23a.) Following the Michigan Supreme Court's pronouncements in *Owens v. Allis Chalmers Corp.*, 326 N.W.2d 372 (Mich. 1982) and *Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176 (Mich. 1984), the court applied Michigan's well-settled risk-utility test to Plaintiff's claims. (App. at 29a-45a.) The court concluded that Plaintiff had failed to submit sufficient

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[2] This "test" consisted of passing some fabric over a burner. (Def.-Appellee Br. on Appeal at 16 n.20.) As Plaintiff was not able to identify the manufacturer, the test was not conducted on fabric identical to the blouse. (*Id.*) Because it was conducted after the close of discovery, Hudson's has never had discovery on the test, nor has it been allowed to challenge the admissibility of the test under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

evidence under the risk-utility test, including the magnitude of the foreseeable risk (which includes measurement of the severity and frequency of a given risk) and the utility of a proposed alternative design (which includes proof of its availability, practicality and effectiveness). (*Id.*) The court also held this risk-utility test applicable to Plaintiff's claim of failure to warn. (*Id.*) The opinion was published at *Hollister v. Dayton Hudson Corp.*, 5 F. Supp. 2d 530 (E.D. Mich. 1998).

C. THE ORIGINAL APPELLATE OPINION

Plaintiff appealed. Her appeal centered on the application of Michigan's risk-utility test to her design defect claim. Conceding that "[u]nder Michigan law, negligence and breach of warranty claims for design defect in product liability cases are judged by the same standard," and that "a product seller like Dayton Hudson is subject to the same standard [of conduct] as a product manufacturer," she contended that the crux of liability was "reasonable care," rather than Michigan's risk-utility test. (Br. of Pl.-Appellant at 17.) Based upon this relaxed standard, she argued that her expert's belated burner tests were sufficient to establish that the blouse was unreasonably flammable. (*Id.* at 34-36.) In the final few pages of her brief, she also maintained the continuing viability of her failure-to-warn claim. (*Id.* at 46-49.) She did so, however, without any attempt to distinguish this claim under the two separate theories of negligence and implied warranty. (*Id.*)

The case was heard by Judges Gilman and Siler, from the Sixth Circuit, and Judge Graham, a district court judge sitting by assignment. (App. at 22a-1.) The panel rejected both of Plaintiff's arguments. (*Id.* at 22a-2.) The court also rejected the belated flammability tests conducted by her expert as unreliable because "in the absence of conditions more like those in [Plaintiff's] apartment, the utility of [the] tests [was] questionable." (*Id.* at 22a-11.) In affirming the

trial court, the panel impliedly held that Plaintiff's failure-to-warn claim also failed Michigan's risk-utility test. The decision was published as *Hollister v. Dayton Hudson Corp.*, 188 F.3d 414 (6th Cir. 1999).

D. THE AMENDED APPELLATE OPINION

After losing the appeal, Plaintiff filed a petition for rehearing and rehearing *en banc*. As required by Sixth Circuit rule, she began her petition with an express identification of arguments in support of her *en banc* petition. (Pl.-Appellant Combined Pet. for Reh'g at 1.) In this section, Plaintiff claimed only that the panel's decision conflicted with an earlier Sixth Circuit opinion in *Phillips v. Hardware Wholesalers, Inc.*, 762 F.2d 46 (6th Cir. 1985) and an unpublished decision in *Sherry v. Massey Ferguson, Inc.*, No. 97-1835, 1998 WL 708709 (6th Cir. Oct. 1, 1998). (*Id.*) She argued that neither case required proof under the risk-utility test as determined by the district court and upheld on appeal. (*Id.* at 4, 13-15.)

In her petition for panel rehearing, Plaintiff argued about the application of the law to her facts. As to her traditional design defect claim she contended that the panel misapplied Michigan's risk-utility test to her evidence. (*Id.* at 6-12.) She insisted that her expert's flammability test, dismissed by the panel as questionable because it was not performed under circumstances similar to that of the accident, was, in fact, consistent with those circumstances. (*Id.* at 9-10.) She attempted to prove this with an affidavit from a new expert, Michael J. Schulz (*Id.* at 10 and Appendix 3 to Pet.), who had never been disclosed under Fed. R. Civ. P. 26 or listed as a witness in the Pretrial Order. Schulz opined about a test he conducted after the district court had granted summary judgment on a stove allegedly obtained from Plaintiff's apartment three years after the accident. (*Id.*) His affidavit, prepared after the court of appeals had ruled (*Id.*), was drafted to address precisely the concerns voiced in the court's

opinion.

Plaintiff also argued that the same facts were sufficient under her failure-to-warn claim. (Pl-Appellant Combined Pet. for Reh'g at 2-6.) Notably, she did not argue that her failure-to-warn claim should have been broken down and separately decided under negligence and implied warranty standards. She also did not argue that the case should have been decided differently because it was against a retailer.

On September 27, 1999, the court directed Hudson's to address the issues raised in Plaintiff's petition for rehearing *en banc* only. (Def.-Appellee Combined Pet. for Reh'g at Ex. B.) Because Fed. R. App. P. 40(a)(3) prohibits a response to a petition for panel rehearing without a specific request, Hudson's counsel contacted the Sixth Circuit regarding what should be briefed. The court advised that Hudson's was to respond only to Plaintiff's *en banc* petition. (Def.-Appellee Resp. to Pet. for Reh'g En Banc at 1 n.1.) According to local rule, "errors in the determination of state law or in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing *en banc*." 6th Cir. R. 35(c). Under the local rule and Fed. R. App. P. 40(a)(3), Hudson's was effectively foreclosed from correcting the numerous factual inaccuracies set forth in Plaintiff's petition for panel rehearing and disputing the newly submitted affidavit.

On January 13, 2000, without requesting a response on Plaintiff's petition for panel rehearing, the court granted that petition and reversed its earlier ruling regarding a claim of implied warranty failure to warn. (App. at 2a-3a.) Although Plaintiff had never made the argument, the panel, consisting of judges from Tennessee, Kentucky and Ohio, abandoned fault concepts and adopted strict liability for retailers under Michigan law. (*Id.* at 3a.) Although it had never been briefed or argued, the panel also found a material distinction between the theories of implied warranty and negligence in the failure-to-warn context. (*Id.* at 10a.) Even though

Plaintiff "failed to offer any evidence of negligence on Dayton Hudson's part, such as proof that the retailer knew of the shirt's extreme flammability or that it had received consumer complaints about the shirt in the past" (*Id.* at 9a), the panel held that Hudson's could be strictly liable if the unknown manufacturer knew or should have known of the blouse's extreme flammability. (*Id.* at 18a.) Reversing its opinion that Plaintiff's burner test was "questionable," the panel now held the test was "credible evidence" sufficient to create a question of fact on this issue. (*Id.* at 19a.) The court of appeals also expressly rejected the application of Michigan's risk-utility test to the failure-to-warn claim. (*Id.* at 17a-18a.) This amended opinion appears at *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731 (6th Cir. 2000).

E. DENIAL OF PETITIONS FOR REHEARING

Following the panel's amended opinion, both parties filed petitions for rehearing. Plaintiff petitioned for a rehearing *en banc*, claiming once again that the panel had misapplied the risk-utility test to her design defect claim. (Pl.-Appellant Supp. Pet. for Reh'g at 2-7.) Hudson's argued that Plaintiff had waived any claim under an implied warranty theory by not including it in the Pretrial Order, the pertinent portions of which were not part of the Joint Appendix on appeal. (Def.-Appellee Combined Pet. for Reh'g at 2-4.) Hudson's also argued that the amended opinion was contrary to well-settled Michigan law and that there is no distinction between failure-to-warn claims under implied warranty and negligence theories as well as contrary to Michigan's express rejection of strict liability. (*Id.* at 4 n.2, 9-11.)

On March 2, 2000, the panel denied both petitions. The announced reason was that "the issues raised in the petitions were fully considered upon the original submission and decision of the case." (App. at 47a.) On March 31, 2000, the court issued its mandate. The cover letter to the mandate

explained that "the certified record was never sent to this Court on appeal." (Letter from 6th Cir. To E.D. Mich. of 3/31/00.) Because the certified record was not sent to the court, this meant that the portions of the Pretrial Order that were pertinent to Hudson's waiver argument in its petition for rehearing were not before the court. Thus, they could not have been considered in the original submission.

REASONS FOR GRANTING THE PETITION

The federalism concerns embodied in this Court's ruling in *Erie* were designed to insure one overarching goal: disputes between citizens will be decided in the same way regardless of whether filed in state or federal court. Without uniform guidelines for deciding these disputes, this Court's goal is frustrated. Without uniform guidelines, a federal court has no real constraints under *Erie*. Under the guise of construction, a federal court may fashion its own rule of law, undermining the very tenets of federalism that *Erie* was intended to protect. When the Sixth Circuit created a cause of action expressly rejected by the Michigan Supreme Court, it acted directly contrary to the express law of Michigan and the interests of federalism. That the Sixth Circuit took this step without a party arguing for this extension, without a complete explication of Michigan law, without the full record before it, without briefs from the parties and based upon evidence developed in response to the court's initial opinion undermines the most basic notions of fair play and justice. This case provides an opportunity to develop uniform guidelines for determining state law under *Erie* and set minimum procedural due process requirements for rehearings in the courts of appeal.

I. IMPORTANT ISSUES OF FEDERALISM REQUIRE THIS COURT TO ARTICULATE AND DEFINE THE STANDARDS FOR ASCERTAINING STATE LAW

A. This Court Should Adopt a Uniform Approach for Determining and Applying State Law

In *Erie*, this Court held that federal courts in diversity actions must apply the substantive law of the state in which they sit. Despite the apparent simplicity of this rule, experienced jurists and scholars have long debated the appropriate procedure to determine the content of state law in the absence of a clear pronouncement from the highest state court. Currently, there is no uniform approach, resulting in turmoil throughout the federal system on this subject. Four completely different approaches (static, predictive, abstention and certification) are used by federal courts. *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459 (1997) (discussing the different approaches). Courts applying the "static" approach determine what the law is and decide the case accordingly.[3] Other courts have rejected this "static" approach and adopted a "predictive" one in which the court attempts to predict how the highest state court would rule on the subject.[4] Still others have refused to

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[3] *See Washington v. Union Carbide Corp.*, 870 F.2d 957, 967 (4th Cir. 1989) (stating that "[f]ederal courts are permitted under Erie...to rule upon state law as it presently exists and not to surmise or suggest its expansion" (*internal citations omitted*)); *Dayton v. Peck, Stow & Wilcox*, 739 F.2d 690, 694 (1st Cir. 1984) ("We must apply the law of the forum as we infer it presently to be, not as it might come to be."); *Rhynes v. Branick Mfg. Corp.*, 629 F.2d 409 (5th Cir. 1980).

[4] *See Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d Cir. 1994) (stating that "[w]here the substantive law of the forum state is uncertain or ambiguous, the job of the federal courts is carefully to

(continued...)

rule in such situations employing the doctrines of either abstention or certification.[5] Sometimes these approaches differ even within the same circuit. *Compare Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 942 (7th Cir. 1986) (stating that "federal court is not the place to press innovative theories of state law") *with Belline v. K-Mart Corp.*, 940 F.2d 184, 186 (7th Cir. 1991) (recognizing that federal courts in diversity cases "must strive to parse state law and, if necessary, forecast its path of evolution"). Proponents of each approach claim that it most closely adheres to the goals of *Erie*.[6]

The resolution of this conflict is important as it would

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predict how the highest court of the forum state would resolve the uncertainty or ambiguity"); *Clark v. Modern Group Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993) ("When the application of [the law of the forum] is not clear . . . we must forecast the position the supreme court of the forum would take on the issue.").

[5] *See Nagy v. Riblet Prod. Corp.*, 79 F.3d 572 (7th Cir. 1996) (certification); *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234 (2d Cir. 1996) (same); *Colonial Properties, Inc. v. Vogue Cleaners, Inc.*, 77 F.3d 384 (11th Cir. 1996) (same); *Nuccio v. Nuccio*, 62 F.3d 14 (1st Cir. 1995) (same); *Allianz Ins. Co. v. Garrett*, 47 F.3d 665 (4th Cir. 1995) (same); *Sonnier v. Chisholm-Ryder Co.*, 47 F.3d 133 (5th Cir. 1995) (same); *Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716 (6th Cir. 1994) (same); *Delaney v. Cade*, 986 F.2d 387 (10th Cir. 1993) (same); *Kaiser v. Memorial Blood Ctr. of Minneapolis, Inc.*, 938 F.2d 90, 93 (8th Cir. 1991); *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509 (2d Cir. 1973) (abstention).

[6] For instance, proponents of the static approach claim that it "follow[s] from *Erie's* embrace of judicial federalism" because it does not allow the federal courts to create law where none exists. *See* Clark, *supra*, at 1462. Prediction of state law, on the other hand, has been described as "far less dramatic and controversial" than other approaches. Delores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Laws of Federalism*, 78 Va. L. Rev. 1671, 1682 (1992). Proponents of certification argue that it prevents "federal courts [from] encroaching on the constitutional prerogatives of the states" that could result if federal courts "proceed to exercise the substantial policymaking discretion within the legislative competence of the states." Clark, *supra*, at 1564.

unify the federal system and guarantee litigants equal treatment. Although this Court has not spoken directly on the approach to be taken to determine issues of unsettled state law,[7] a studied review of case law and commentary provides insights toward the creation of uniform guidelines. Regardless of the differing philosophical views toward ascertaining state law, uniform guidelines will create an easily understood, flexible approach that will end the judicial debate and aid a federal court in meeting its duty under *Erie*.

The approach is simple and begins with decisions of the highest state court on the subject. *See* Charles Alan Wright et al., *Federal Practice and Procedure Jurisdiction* § 4507 (2d ed. 1996), *citing Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983). If the state's highest court has not ruled on the issue, then federal courts should look to decisions of intermediate courts within the state. *See West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940). Absent definitive holdings from any state court, federal courts should look next to "developing line[s] of authorities", "dicta", "doubts or ambiguities in the opinions", and "legislative development[s]". *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 205 (1956).

In situations where state law is so sparse or intractable that it is not susceptible to easy judicial resolution, then a federal court should look to other means.

> "If . . . the forum state has a procedure by which its highest court will answer particular

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[7] The predictive approach gains support from Justice Rehnquist's dissent, joined by Justices White and Stevens, in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), that in such cases:

> [T]he court's task is to try to predict how the highest court of that State would decide the question. A judge attempting to predict how a state court would rule must use not only his legal reasoning skills, but also his experiences and perceptions of judicial behavior in that state.

Id. at 241.

> questions of law certified to it by a federal court, the federal court may resort to this procedure to obtain an authoritative and binding statement on important but difficult and unclear issues of the applicable state law."

Wright et al., *supra*, at 169. This Court has endorsed certification under these circumstances. *See Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988).

The goal of these guidelines is clear. "The nub of the policy that underlies *Erie R. Co. v. Tompkins*, is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result." *Guarantee Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). In the context of a case like this one, a federal court is never free to choose a rule of law that has been recently and expressly rejected by the highest state court. Rather, through application of these principles it must strive to apply the law of the state as it would be applied to litigants within the state.

B. By Failing to Apply a Principled *Erie* Analysis, the Sixth Circuit Reached a Conclusion that Has Been Squarely Rejected by Michigan Courts

1. The Sixth Circuit's Adoption of Strict Liability for Retailers Directly Conflicts with Several Decisions by Michigan's Highest Court and an Overwhelming Number of Intermediate Courts

In reversing its first opinion, the court of appeals concluded that retailers could be held liable in implied warranty, failure-to-warn claims without proof of negligence against them. Citing two stale Michigan cases and a

Minnesota case for a proposition that Michigan's highest court has expressly rejected, the panel concluded that "a retailer may be held liable for breaching its implied warranty of merchantability by selling a defective product, even if the retailer's conduct is wholly free from negligence." (App. at 9a.) Effectively, the court adopted strict liability against retailers.

Contrary to the court's decision, Michigan has never recognized the imposition of liability without proof of fault in any context. Indeed, the Michigan Supreme Court has universally rejected the application of strict liability in product liability cases. *See Prentis*, 365 N.W.2d at 181 n.9 ("[w]e do not agree . . . that this Court abandoned fault concepts"); *Hickey v. Zezulka*, 487 N.W.2d 106, 122, n.11 (Mich. 1992) ("this Court has not adopted the doctrine of strict products liability").[8] The Michigan Supreme Court has also rejected the application of strict liability in failure-to-warn claims. *See Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208, 212 (Mich. 1992) (noting that "[a] duty is imposed on a manufacturer **or seller** to warn" only "under **negligence** principles" set forth in Restatement (Second) of Torts § 388 (1965). (emphasis added)). The court of appeals decision directly conflicts with these

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[8] An overwhelming number of federal and intermediate state courts have rejected claims of strict liability as not recognized in Michigan. *See, Nowak v. Emhart Corp.*, No. 89-2336, 1990 WL 156102 (6th Cir. Oct. 18, 1990); *Beaver v. Howard Miller Clock Co.*, 852 F. Supp. 631 (W.D. Mich. 1994); *Stephens v. G.D. Searle & Co.*, 602 F. Supp. 379 (E.D. Mich. 1985) (noting that the defendant was correct in asserting that "Michigan courts have rejected the use of strict liability as a separate theory of recovery in products liability cases."); *Pele v. Bendix Mach. Tool Corp.*, 314 N.W.2d 614, 620 (Mich. Ct. App. 1982) ("Michigan has not yet openly embraced strict liability as a theory of recovery in products liability."); *Phillips v. J.L. Hudson Co.*, 263 N.W.2d 3 (Mich. Ct. App. 1977); *Dooms v. Stewart Billing & Co.*, 241 N.W.2d 738 (Mich. Ct. App. 1976); *Cova v. Harley Davidson Motor Co.*, 182 N.W.2d 800, 806 (Mich. Ct. App. 1970).

opinions.

The decisions of *Prentis, Hickey* and *Glittenberg* cannot be ignored simply because Hudson's is a retailer. In *Ghrist v. Chrysler Corp.*, 547 N.W.2d 272, 275 (Mich. 1996), the Michigan Supreme Court held that "[t]he law of products liability imposes greater responsibility on one who manufactures and designs a chattel than on one who merely supplies it." If a retailer is to be held to a lesser standard than a manufacturer, then it cannot possibly be held strictly liable for the manufacturer's conduct.

Nor did any developing trends or secondary sources allow the court of appeals to ignore this clear rejection of strict liability. Recently, the Michigan legislature passed a law stating that, absent an express warranty, "a seller other than a manufacturer is not liable for harm allegedly caused by the product unless . . . [t]he seller failed to exercise reasonable care, including breach of any implied warranty." Mich. Comp. Laws Ann. § 600.2947 (West Supp. 2000) (effective Mar. 26, 1996). Under this statute, negligence must be shown against the retailer in all product liability cases.

The court of appeals ignored the Michigan Supreme Court and the recent legislative initiatives. It did so based upon strained readings of a 1965 decision by the Michigan Supreme Court, *Piercefield v. Remington Arms Co.*, 133 N.W.2d 129, 134 (Mich. 1965), a 1977 decision by the Michigan Court of Appeals, *Johnson v. Chrysler Corp.*, 254 N.W.2d 569, 571 (Mich. Ct. App. 1977), and a Minnesota appellate court decision. *See Marcon v. Kmart Corp.*, 573 N.W.2d 728 (Minn. Ct. App. 1998). However, the Sixth Circuit's interpretation that *Piercefield* and *Johnson* adopted liability without fault was specifically rejected by the Michigan Supreme Court in *Prentis*. *See Prentis*, 365 N.W.2d 181 n.9 (rejecting a similar reading of the two cases advocated in a dissent and stating "[n]or do we interpret the decision in *Piercefield* as an adoption of the concept of strict

liability in tort.").[9]

The court of appeals decision is in direct conflict with the expressed views of the Michigan Supreme Court. Michigan has not abandoned concepts of fault and has always held that, at a minimum, negligence must be shown against all defendants. A principled analysis under *Erie* should have led the court to this conclusion.

2. The Sixth Circuit's Distinction Between Implied Warranty and Negligent Failure-to-Warn Claims Directly Conflicts with Several Decisions of Michigan's Highest and Intermediate Courts

In holding retailers strictly liable for the actions of the manufacturer, the court of appeals created a distinction between negligence and implied warranty theories in the failure-to-warn context. Although acknowledging that in many situations "claims of negligence and breach of implied warranty are, for all intents and purposes, identical" (App. at 9a), the panel concluded that "[w]hen the defendant is a *non*-manufacturing seller, however, the two analyses diverge." (*Id.* at 10a.) Based upon this perception, the court determined that a claim of implied warranty failure to warn was distinct from a claim of negligent failure to warn and should be decided differently. This imagined distinction allowed the court to abandon negligence and hold Hudson's liable based on the conduct of an unknown manufacturer.

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[9] The court of appeals curious citation to a Minnesota opinion for Michigan common law cannot be explained. Similarly curious were the court's citations to the law of Pennsylvania and Oregon as well as its citation to opinions of the First, Fourth and District of Columbia Circuits applying non-Michigan law. These citations appear in the court's discussion of other issues, including proximate cause. Reliance on the law of a state other than the forum state is wholly inconsistent with *Erie*, and suggests an attempt to create a federal common law.

The panel's distinction, however, has no basis in Michigan law. The Michigan Supreme Court expressly rejected this distinction in *Smith v. E.R. Squibb & Sons, Inc.*, 273 N.W.2d 476 (Mich. 1979), ruling that both negligence and implied warranty failure-to-warn claims "involve identical evidence and require proof of exactly the same elements," i.e., "reasonable care under the circumstances." *Id.* at 480. "This is true because the focus is upon the adequacy of the warnings, regardless of the theory of liability."[10] *Id.* This unified treatment also applies to claims against non-manufacturing sellers such as retailers. *Coy v. Richard's Indus., Inc.*, 428 N.W.2d 734, 738 (Mich. Ct. App. 1988), *appeal denied*, 432 Mich. 856 (1989) (treating negligence and implied warranty failure-to-warn claims as one in an action against a non-manufacturing seller).

The court of appeals adopted exactly what the Michigan Supreme Court had rejected: a divergent treatment of failure-to-warn claims under implied warranty and negligence theories. The Sixth Circuit pointed to no line of authorities or legislative developments that would jusitify ignoring *Squibb* and *Coy*. In accordance with *Erie* it should have treated Plaintiff's failure-to-warn claim under an implied warranty

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[10] Since *Smith*, Michigan federal and state courts have unanimously held that claims of failure to warn against a non-manufacturing seller under either a theory of implied warranty or negligence are to be treated as claims of negligence. *See Dewit v. Morgen Scaffolding, Inc.*, No.94-1947, 1996 WL 99314 (6th Cir. Mar. 6, 1996); *Nowak v. Emhart Corp*, No. 89-2336, 1990 WL 156102 (6th Cir. Oct. 18, 1990); *Rusin v. Glendale Optical Co.*, 805 F.2d 650, 653-54 (6th Cir. 1986); *Bogorad v. Eli Lilly & Co.*, 768 F.2d 93 (6th Cir. 1985); *Burt v. Fumigation Serv. & Supply, Inc.*, 926 F. Supp. 624 (W.D. Mich. 1996); *Fosburg v. BASF Wyandotte, Corp.*, No. G89-40316, 1990 WL 369722 (W.D. Mich. June 7, 1990); *Marneef v. United States*, 533 F. Supp. 129 (E.D. Mich. 1981); *Gregory v. Cincinnati, Inc*, 538 N.W.2d 325, 329 n.7 (Mich. 1995); *Glittenberg*, 491 N.W.2d at 212-13; *Vincent v. Allen Bradley Co.*, 291 N.W.2d 66 (Mich. Ct. App. 1980); *Spencer v. Ford Motor Co.*, 367 N.W.2d 393 (Mich. Ct. App. 1984).

theory in the same way it was treated under a negligence theory.

C. A Proper Survey of Michigan Law Would Have Led to an Affirmance of the District Court

A proper survey of Michigan law should have led the Sixth Circuit to a variety of state court decisions expressly rejecting the concept of strict liability. This survey should also have led the court to a number of decisions embracing Restatement (Second) of Torts § 388 in claims of failure to warn against retailers. Finally, this survey should have led the court to the adoption of the risk-utility test in all claims of failure to warn.

A complete *Erie* analysis would not have led to the abandonment of fault against retailers. It would have revealed that the Michigan Supreme Court expressly stated that sellers, like manufacturers, are judged under the "negligence principles" expressed in Restatement (Second) of Torts § 388.[11] That section requires actual proof of negligence against the seller that it (a) "knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied," and (b) has "no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition," and (c) "fail to exercise reasonable care to inform [users] of its dangerous condition or of the facts which make it likely to be dangerous." Restatement (Second) Torts § 388. A principled analysis would have demonstrated that this test must be satisfied as to

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[11] Inexplicably, in adopting strict liability for non-manufacturing sellers, the court of appeals left out the word "seller" from the referenced text of the *Glittenberg* opinion. (App. at 18a.) Yet the *Glittenberg* decision specifically includes the word "seller" in its description of the duty. The court of appeals simply cannot read out such an important word from the text of the *Glittenberg* opinion.

retailers in failure-to-warn claims. Because there is no divergence between implied warranty and negligence theories of failure to warn, both should be decided under Section 388. In both cases, actual proof of fault against the retailer was required.

A principled *Erie* analysis would also have led the panel to consider Michigan's risk-utility test in failure-to-warn claims.[12] Although the Michigan Supreme Court has not ruled directly on its applicability to failure-to-warn claims, there are strong indications that it would do so. For instance, in *Prentis* the Michigan Supreme Court was faced with allegations of failure to warn when it adopted this test for all "design defect" claims. Later, in *Gregory*, the Michigan Supreme Court suggested that failure to warn claims should be analyzed the same way. *Gregory*, 538 N.W.2d at 328-29 (identifying failure-to-warn as a type of design defect). Reading these cases together strongly indicates that the risk-utility test should be applied to claims of failure to warn. In fact, a different panel of the Sixth Circuit expressed this same view in *Rhodes v. Cincinnati, Inc.*, No. 85-1165, 1986 WL 16402 (Jan. 28, 1986) (unpublished) ("*Owens* was not a failure to warn case, but the prima facie case proofs it required [Michigan's risk-utility test] are essentially the same for this products liability case.").

This reading is also consistent with recent legislative trends. Adopted in 1995 and having an effective date one

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[12] Michigan's risk-utility test was adopted in *Prentis*, 365 N.W.2d at 186. The Supreme Court of Michigan rejected all notions of strict liability and adopted "forthrightly, a pure negligence, risk-utility test" in design defect product liability actions. 365 N.W. 2d at 186. In *Owens*, that court established that in judging the reasonableness of a given design, a *prima facie* case of design defect requires "evidence concerning both the magnitude of foreseeable risks involved and the reasonableness of the alternative design." 326 N.W.2d at 378-79. This "stringent standard . . . evinces Michigan's desire to avoid abuses that could occur in design defect cases were a lesser standard required." *Fisher v. Kawasaki Indus., Inc.*, 854 F. Supp. 467, 471 (E.D. Mich. 1994).

day after Plaintiff filed her action, the Michigan legislature adopted extensive tort reform measures. Defining all claims of "production defect" to include failure-to-warn claims, Mich. Comp. Laws Ann. § 600.2945 (West Supp. 2000), the act mandates the risk-utility test be applied to all claims of production defect, even those against a seller. *See* Mich. Comp. Laws § 600.2946(2) (requiring proof of "a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others.").[13]

If there were any doubt as to the duty of a retailer in failure-to-warn claims, or whether the risk utility test applied to such claims, the court of appeals should have certified the question to the Michigan Supreme Court. Certification procedures exist under Michigan Rules of Civil Procedure, and were available to the panel. *See* Michigan Court Rule 7.305.

Through the application of either Section 388 of the Restatement or the risk-utility test, the court should have affirmed the grant of summary judgment in Hudson's favor. As the court itself concluded, Plaintiff offered no proof that Hudson's "knew of the shirt's extreme flammability or that it had received consumer complaints about the shirt in the past." (App. at 9a.) Thus, there was no proof that Hudson's had the knowledge necessary for finding a violation of Section 388. Similarly, if the court had applied the risk-utility test to the failure-to-warn claim, the result would have been the same. For the same reason Plaintiff's proof failed under the design defect claim, it also would have failed under

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[13] Despite an effective date one day after Plaintiff filed suit, Michigan courts may have retroactively applied this statute to her cause of action. *See Tulkku v. Mackworth Rees Div. of Avis Indus., Inc.*, 301 N.W.2d 46 (Mich. Ct. App. 1980) (upholding retroactive application of earlier product liability legislation).

her failure-to-warn claim. Under either circumstance, the Sixth Circuit erred.

II. THE SIXTH CIRCUIT WENT BEYOND THE SCOPE OF ITS AUTHORITY WHEN, ON REHEARING, IT CONSIDERED NEW EVIDENCE

Under the Rules Enabling Act, this Court has the power to prescribe rules of procedure for the various district and appellate courts. 28 U.S.C. § 2072. Once prescribed, these rules have the force of law and are as binding on the courts as a statute. *American Fed'n of Musicians v. Stein,* 213 F.2d 679 (6th Cir. 1954). More importantly, these rules help to define the minimum requirements of procedural due process.

Federal Rule of Civil Procedure 60(b) is the only avenue authorized by this Court for the consideration of new evidence after judgment. The purpose of the rule is to protect the finality of judgments while still permitting redress for the truly wronged litigant. Two points need to be emphasized about this procedure. First, the motion must be brought in the district court where the judgment was entered. Wright et al, *supra*, at § 2865. This makes perfectly good sense as the trial court will be in the best position to judge the importance of the evidence. Second, not all evidence merits relief. To protect the finality of judgments while still permitting redress for the truly wronged litigant, courts have generally held that the evidence must satisfy certain criteria. The proponent of the evidence must show that it was in existence at time of trial, explain why it was not available, and demonstrate due diligence in acquiring it. *Id.* The purpose behind these criteria is to ensure that the evidence is, in fact, new. The litigant is not entitled to relief for tactical decisions that may turn out badly.

Rule 60(b) is the only rule authorizing relief from a judgment because of new evidence. There is no counterpart in the Federal Rules of Appellate Procedure. Again, this scheme makes eminently good sense. The appellate court's

jurisdiction is ordinarily limited to a review of claimed factual and legal errors. Obviously, the appellate court cannot logically decide whether the district court committed error regarding evidence that was never before it. This rule is also consistent with the scope of Fed. R. App. P. 40 which permits rehearing only where law or facts have been "overlooked or misapprehended." Fed. R. App. P. 40(a)(2). The appellate courts have been adamant in denying relief for new evidence brought in a petition for rehearing.

In *Goland v. Central Intelligence Agency*, 607 F.2d 339, 370-71 (D.C. Cir. 1978), the court explained that "an appellate opinion is based upon the record before it, and hence cannot be set aside on the basis of newly discovered facts outside the record." As amplified by the Ninth Circuit:

> A panel is simply not capable of having *overlooked or misapprehended* "points of . . . fact" occurring *subsequent* to its initial decision. Consideration of subsequent factual occurrences is, thus, beyond the scope of a petition for rehearing.

Armster v. United States Dist. Court for the Cent. Dist. of Ca., 806 F.2d 1347, 1356-57 (9th Cir. 1986) (emphasis in original) (citations omitted). This is especially true where the evidence was created in response to the panel's opinion. If the law were contrary, courts of appeals would continuously be bombarded with petitions for rehearing containing new evidence engineered to address their opinions.

In its original opinion the court took pains to point out that Plaintiff's case "basically rests" on her expert's flammability tests. (App. at 22a-11.) The court rejected these tests, however, because there was no proof that the conditions in the tests approximated the conditions in Plaintiff's apartment at the time of the fire. (*Id.* at 22a-11-22a-12.) Without such proof, the court concluded that the utility of the tests was "questionable." (*Id.* at 22a-11.)

In her petition for a rehearing, Plaintiff submitted the affidavit of a new witness, Michael Schulz, responding to the court's concerns. (Pl.-Appellant Combined Pet. for Reh'g at Appendix 3.) Describing tests conducted after the district court granted summary judgment, the Schulz affidavit was designed to show that the flammability tests did approximate the conditions in Plaintiff's apartment. When it amended its opinion, the panel completely changed its view of Plaintiff's evidence. Where it originally found her proof "questionable," it now found it sufficiently "credible" that she was entitled to a jury trial on her failure-to-warn claim. (App. at 22a.) The only apparent reason for this change of heart was the Schulz affidavit.

Thus, the panel considered on rehearing new evidence in direct contravention of Fed. R. Civ. P. 60(b) and Fed. R. App. P. 40(a)(2). Not only did the consideration of this new evidence violate both rules, it also violated Hudson's right to procedural due process.

III. THE SIXTH CIRCUIT VIOLATED HUDSON'S DUE PROCESS RIGHTS ON REHEARING WHEN, ON AN INCOMPLETE RECORD AND WITHOUT BRIEFING, IT DEVELOPED A NEW THEORY OF LIABILITY NOT ADVANCED BY EITHER PARTY AND BASED ON NEW EVIDENCE

The Fifth Amendment guarantees that no one will be deprived of property without due process of law. U.S. Const. amend. V. This Court has held that the due process requirements apply to corporations. *See Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). A judgment is property within the meaning of the Fifth Amendment. *See Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347 (9th Cir. 1999). Since Hudson's had a judgment in this case, an amendment of that judgment had to be accomplished with regard to Hudson's due process rights.

The essence of procedural due process is fairness. *See In re Murchison*, 349 U.S. 133, 136 (1955). This means that a litigant cannot be deprived of a property right without "notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

The court of appeals developed its new theory of liability without any urging from Plaintiff and without the complete record. Indeed, the court conceded that Plaintiff had "not argued at any stage of this litigation that her implied warranty claim requires distinct treatment from her negligence claim." (App. at 10a.) The court's ruling was therefore made on an issue never raised or briefed.

These actions violated Hudson's due process rights. Hudson's never had notice that the panel was reconsidering its opinion, was considering the Schulz affidavit, and was considering a change in Michigan law. In fact, Hudson's was led to exactly the opposite conclusion, that the panel was not reconsidering its opinion at all. Because the panel issued its amended opinion without having heard from Hudson's on so much as a single topic that was the subject of amendment, it can hardly be said that Hudson's was granted a meaningful opportunity to be heard.[14] This conclusion can only be underscored given that the panel considered the Schulz affidavit in direct contravention of Rule 60(b) and without giving Hudson's the opportunity to respond. The denial of Hudson's right to be heard is particularly troubling in light of the court's adoption of a rule of law that was previously unknown in Michigan and without the benefit of a complete record.

The panel also denied Hudson's due process rights when it remanded on an issue that Plaintiff had abandoned. In

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[14] It is of little moment that Hudson's could file its own petition for a rehearing after the court issued its amended opinion. Having reversed itself once already, the Sixth Circuit was unlikely to reverse itself again. Thus, Hudson's right to petition for rehearing does not constitute a meaningful opportunity to be heard.

reversing on an implied warranty theory, the panel concluded that it had "been properly raised both below and on appeal—it was simply analyzed under the wrong legal standard." (*Id.*) This was not the case. Plaintiff had not listed her failure-to-warn claim under an implied warranty theory in the Joint Final Pretrial Order. (Def.-Appellee Combined Pet. for Reh'g at 2-4.) In fact, the Pretrial Order contained no claims of implied warranty. (*Id.*)

By not including any claims under an implied warranty theory in the Pretrial Order, Plaintiff abandoned them. In the Eastern District of Michigan the Pretrial Order supercedes all pleadings. E.D. Mich. R. 16.2. Once entered, only the issues raised and listed in the order can be adjudicated, and any issues not included are deemed waived or abandoned. *See Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461 (6th Cir. 1988). Based on this authority, Plaintiff's allegations of implied warranty had been waived and could not have been adjudicated in the trial court, let alone considered on appeal or remanded.

The panel's conclusion that Plaintiff had preserved her theory of implied warranty was based upon an incomplete record. The Pretrial Order was not submitted with the Joint Appendix of the parties.[15] Thus, the court could never have considered Plaintiff's abandonment of this claim in the Pretrial Order. Its decision to remand on that claim without providing Hudson's with notice that it was considering the claim or an opportunity to brief the issue was a plain violation of Hudson's due process rights.

The due process problems grow even larger with the court's conclusion that Plaintiff "has the right to proceed to

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[15] The Joint Appendix contained the pleadings and other papers that the parties thought were necessary for the court's decision, but, because the issue was not raised, did not contain the complete Pretrial Order. Nor did the court seek the record from the district court. When the court issued its mandate it admitted that "the certified record was never sent to this Court on appeal." (Letter from 6th Cir. to E.D. Mich. of 3/31/00.)

the next stage of the litigation." In phrasing its opinion in this way, the court of appeals may have precluded the district court from hearing the numerous pending, but undecided, motions before it.[16] This is precisely the view of the district court upon remand. (Tr. of May 18, 2000 at 17-19). Because the court referred to Plaintiff's proof as "credible evidence," it may also have foreclosed Hudson's from challenging Plaintiff's various expert test results under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The court of appeals simply should not decide issues without notice and an opportunity to be heard.

The court of appeals violated Hudson's due process rights. Hudson's never had notice that the panel was reconsidering its opinion, considering new evidence or considering a change in Michigan law. This Court should accept certiorari and reverse the Sixth Circuit's ruling.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT

Federal courts are asked to review and apply state law every day, yet there remains no clear directive for litigants and courts in ascertaining state law in any given case. Absent a ruling from a state's highest court, federal courts are left with a menu of legal doctrines from which to analyze, determine and apply state law. This necessarily results in

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[16] One of these motions concerned the issue of proximate cause. Although this motion was pending before the district court, the district court had never made a decision because it granted summary judgment on other grounds. Because it was not decided, it was not briefed by the parties, or presented on appeal. Despite these facts, the court of appeals ruled directly on this issue based solely upon authorities from other states. (App. at 19a-20a, *discussing in turn Deffebach v. Lansburgh & Bro.*, 150 F.2d 591 (D.C. Cir. 1945), *Howard v. McCrory Corp.*, 601 F.2d 133 (4th Cir. 1979), *and Wilson v. Bradlees of New England, Inc.*, 96 F.3d 552 (1st Cir. 1996).) This was a violation of Hudson's due process rights and *Erie*.

inconsistent applications of state law among federal courts, even within federal districts. Despite the unambiguous direction of this Court in *Erie*, the goals of the *Erie* doctrine may be lost without the kind of clear directive that only this Court can provide.

Erie demands the uniform application of state law by federal courts to protect state citizens and preserve federalism. While striving to achieve these laudable principles, however, federal courts over time have applied numerous tests resulting in inconsistent results, precisely the evil to be avoided under *Erie*. The present case is an excellent example.

Before the panel's amended opinion, Michigan retailers had enjoyed the benefits of a fault-based product liability system. They had ordered their affairs ranging from such things as the purchase of liability insurance to the wording of contracts with their vendors based on the notion that their liability turned on their fault. The Sixth Circuit's opinion upsets this comfortable certainty. It creates confusion, encourages forum shopping, and places an unnecessary economic burden on Michigan retailers.

Michigan is but one of fifty states, as well as the District of Columbia and territorial jurisdictions, where citizens are guaranteed that the law of the forum is respected in a federal court. This Court has long recognized the importance of federalism. *See United States v. Lopez*, 514 U.S. 549, 552 (1995) ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front" "quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))). The constitution reserves to the states all powers not granted to the federal government. U.S. Const. amend. X. Nonetheless, the court below reached a conclusion directly contrary to clear pronouncements by both primary and secondary authorities in the forum state. Its conclusion has been directly rejected by Michigan's highest court and its legislature. Simply put, the federal courts have no power to legislate Michigan or any other state's law. For

this reason alone, the questions presented are important and require this Court's analysis and decision.

Finally, these questions are important in preserving the orderly administration of justice and finality of judgments. Through local rules, circuits have defined their own procedures for rehearing leading to differing treatments. Thousands of litigants are left without a uniform administration of justice. Although litigants should always have the opportunity to bring errors to an appellate court's attention on rehearing, the procedure for doing so, however, must be fair to both sides and conducted in accordance with the guarantees of due process. New evidence must not be considered at the appellate level. The opposing party must be given an opportunity to respond, not only as a matter of fairness, but to prevent further error. The court must not undertake a searching inquiry on its own initiative and without the benefit of the parties' assistance as this may only compound the problem. Notice and an opportunity to be heard are more than aids in the just resolution of disputes, they are essential elements of the fairness guaranteed by the Fifth Amendment. Due process must not be abridged for any reason.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)
98-1660

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Laura Hollister,
Plaintiff-Appellant,

American Community Mutual Insurance Company,
Intervenor,

v.

Dayton Hudson Corporation,
Defendant-Appellee.

August 4, 1999, Argued

January 13, 2000, Decided

January 13, 2000, Filed

This Amended Opinion Substituted on Petition for Rehearing for Withdrawn Opinion of August 25, 1999, Previously Reported at: *1999 U.S. App. LEXIS 20061.*

COUNSEL:
ARGUED: Steven P. Handler, McDERMOTT, WILL & EMERY, Chicago, Illinois, for Appellant.

Barry B. Sutton, HARVEY & KRUSE, Troy, Michigan, for Appellee.

ON BRIEF: Steven P. Handler, Charles M. Gering, McDERMOTT, WILL & EMERY, Chicago, Illinois, Robert P. Lynn, Jr., Mineola, New York, for Appellant.

Barry B. Sutton, Dennis M. Goebel, HARVEY & KRUSE, Troy, Michigan, for Appellee.

JUDGES:
Before: SILER and GILMAN, Circuit Judges; GRAHAM, District Judge. *

OPINIONBY:
RONALD LEE GILMAN

OPINION:

AMENDED OPINION

RONALD LEE GILMAN, Circuit Judge. Laura Hollister, a citizen of Michigan, was severely burned when the shirt that she was wearing ignited upon contact with a hot electric burner on her apartment stove.[1] She brought a lawsuit against Dayton Hudson Corporation, the Minnesota-based owner of the department store where the shirt was purchased, alleging negligence and breach of the store's implied warranty of merchantability. Her claims were based on allegations that (1) the shirt's design rendered it unreasonably dangerous, and (2) the shirt failed to carry a warning as to its extreme flammability. The district court granted Dayton Hudson's motion for summary judgment, concluding that Hollister had not established a prima facie case of design defect under Michigan law, and that any duty to warn was obviated by the open and obvious nature of the alleged defect.

Contrary to the decision of the district court, we believe that Hollister has adduced sufficient evidence to allow a

reasonable juror to conclude that the shirt sold by Dayton Hudson was defective because of its failure to carry a warning regarding its extreme flammability. Although Hollister has failed to show any negligence on Dayton Hudson's part regarding this alleged defect, she need only establish a prima facie case that the shirt was defective and that it caused her injuries in order to pursue her claim for breach of implied warranty. We therefore **AFFIRM** the district court's entry of summary judgment on Hollister's negligence claim, **REVERSE** its entry of summary judgment on Hollister's breach of implied warranty claim to the extent that the claim is based upon a failure to warn, and **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

A.The accident

In November of 1995, Hollister was a business student at Northwestern University in Evanston, Illinois. On November 4, 1995, she attended a business-school party with her friend Jerome Joliet. She later returned to her apartment accompanied by another friend, Diarmuid O'Connell, at approximately 1:45 a.m. the next morning. According to O'Connell, Hollister was intoxicated when the two left the party. O'Connell departed from Hollister's apartment at approximately 2:10 a.m.

Hollister has no memory of subsequent events. The next thing that she can recall is seeing herself in the mirror at approximately 9:30 a.m. on November 5. Realizing that she was injured, Hollister phoned her parents in Michigan. According to Hollister's parents, she repeated the words "fire, burner, pasta." Hollister's parents asked her for the number of a friend and she supplied O'Connell's. After leaving a message on O'Connell's machine, Hollister's father asked his daughter for another number, and she supplied Joliet's. Mr. Hollister then left a message on Joliet's machine. Joliet

arrived at Hollister's apartment at about 10:00 a.m. that day, discovered that Hollister was severely burned, and called 911. Evanston Fire Department paramedics came immediately and treated Hollister.

One of the paramedics found that the right front and rear burners of Hollister's stove were glowing red when he arrived. There was a bowl of cooked pasta in the sink, and a pot sitting on the stove between the burners. The fire department report concludes that the fire began in the kitchen. At the request of the fire department, the United States Bureau of Alcohol, Tobacco, and Firearms (BATF) assisted in investigating the accident. The BATF report also indicates that the fire began in the kitchen. It concludes that the accident most likely occurred when Hollister reached for something in the cabinet above the stove (the door to which was open) and her shirt-tail, which was hanging loose, brushed against the burner and ignited. Hollister next apparently attempted to smother the flames on the counter, where burned cloth was found. The report states that there was evidence that she then attempted to extinguish the flames with water from the bathtub. There was evidence that after doing so, Hollister rested on her bed, where more burned clothing and body fluids were found. Small remnants of Hollister's shirt, a brown and black plaid button-down, were found. Hollister's mother stated that she had purchased this shirt for Hollister at a Dayton Hudson's department store six years earlier. Hollister was also wearing a T-shirt and bra under the large plaid shirt at the time of the accident. The report concludes that "the cause of this fire should be classified as accidental caused by ignition of the victim's clothing by the stove burner while she was cooking."

Hollister was brought to Evanston Hospital, where she was treated for third-degree burns over fifty-five percent of her body. She was later transferred to Loyola Hospital in Chicago, where she stayed until December 21, 1995. After treatment at Loyola, Hollister was transferred to the

University of Michigan Medical Center in Ann Arbor, Michigan, where she remained until April 17, 1996.

As a result of her burns, Hollister has undergone comprehensive skin grafting to most of her upper body, as well as plastic and reconstructive surgery. She remains profoundly disfigured. Her medical expenses at the time of the district court's ruling in May of 1998 amounted to approximately $ 980,000.

B.Procedural background

On March 27, 1996, Hollister's parents filed suit in the Circuit Court of Wayne County, Michigan. Named as defendants were Dayton Hudson (the parent company of the department store where the shirt was purchased), Ralph Lauren (the company that Hollister's mother originally believed was the manufacturer of the shirt), Banana Republic (the retailer of the T-shirt), Victoria's Secret (the retailer of the bra), and General Electric (the manufacturer of the stove). The complaint alleged that the shirt was defective because it was extremely flammable and because it did not provide a warning of this condition. On July 11, 1996, the case was removed to the United States District Court for the Eastern District of Michigan on the basis of diversity of citizenship. Pursuant to a July 31, 1997 motion, Hollister was substituted for her parents as the plaintiff.

On August 1, 1997, the district court held a status conference with all of the parties. At that time, the court noted that in the 16 months that the case had been in existence, a "whole lot of nothing" had taken place. At that point, Hollister had arranged for no expert witnesses other than a consultant who was going to conduct tests of various fabrics. The court directed Hollister to secure and disclose her experts, pursuant to Rule 26 of the Federal Rules of Civil Procedure, by September 1, 1997. A discovery deadline of October 31, 1997 was also set.

On September 1, 1997, Hollister submitted reports pursuant to Rule 26 from the following four experts: David Hall (textile expert), Edmund Knight (expert on cause and origin of the fire), Anna Dutka (economic damages expert), and Alan Hedge (stove design expert). Dr. Hall's report stated that he was still looking for "exemplar" fabric identical to the rayon used in the shirt in question, and that in his opinion the fabric was dangerously flammable. The report identifies the fabric as 100% rayon, loosely woven with 1.5 denier threads.

Dr. Hall offered no opinion as to the feasibility of using a different fabric to construct a similar shirt, and acknowledged that he had no expertise in the use of fabrics in clothing. He initially testified that the flammability test promulgated by the Consumer Products Safety Commission (CPSC), set forth in 16 C.F.R. § 1610, determines whether a fabric is "unreasonably dangerous." The regulation's purpose is "to reduce danger of injury and loss of life by providing, on a national basis, standard methods of testing and rating the flammability of textiles and textile products for clothing use, thereby discouraging the use of any dangerously flammable clothing textiles." 16 C.F.R. § 1610.1. Because their products passed the CPSC flammability test, Banana Republic and Victoria's Secret were eventually dismissed as defendants. Although Dr. Hall never tested the shirt remnants pursuant to 16 C.F.R. § 1610, Dayton Hudson's expert did. The fabric passed the test. Despite this fact, Dayton Hudson remained as a defendant. By October of 1997, Hollister had dismissed all of the other remaining parties.

In his deposition on October 31, 1997, Dayton Hudson's causation expert, John Campbell, acknowledged that he had located an "exemplar" shirt composed of fabric identical to that used in the shirt involved in the accident. Hollister's counsel subsequently purchased identical shirts to the one that Campbell had identified, and gave them to Dr. Hall for examination and testing.

Dr. Hall determined that the characteristics of the exemplar fabric were substantially identical to the shirt that Hollister had been wearing at the time of the accident. He then conducted a test comparing the exemplar fabric with fourteen other fabrics. The test utilized a stove-top electric burner set at 1100-1160 degrees, and involved sweeping 3.5 by 10-inch strips of the various fabrics across the burner. Hall then timed the rate of ignition and burning. The exemplar fabric ignited immediately, and burned completely within six seconds. Eleven of the fourteen non-exemplar samples failed to ignite at all. The three samples that did ignite were another 100% rayon sample, a rayon-polyester blend (both of which took about twelve seconds to burn completely), and a piece of newspaper (which burned in four seconds).

At the close of discovery, Dayton Hudson moved for summary judgment. One ground focused upon the requirement that a plaintiff such as Hollister must prove the effectiveness of a proposed alternative design. In response, Hollister acknowledged that she would not be calling an expert witness on the effectiveness of an alternative design. She claimed that this was a question of fact for the jury that did not require expert testimony. The district court subsequently held a hearing on January 5, 1998 to clarify Hollister's position, stating as follows:

> THE COURT: --you say that this is so clear, the risk of severe injury from a highly flammable fabric is so manifest, that no expert testimony is needed. That--that really made me open my eyes. You mean we can simply impanel a jury, and you can put on your proof without any testimony to show this?
>
> . . .
>
> MR. HANDLER: We mean it.

The district court then presented the parties with a list of six requirements necessary to establish a prima facie case of design defect under Michigan law.

After briefing by both parties, the district court granted Dayton Hudson's motion for summary judgment on May 12, 1998. Hollister timely filed her notice of appeal to this court.

II. ANALYSIS

A.Standard of review

We review de novo the district court's grant of summary judgment. **See, e.g., *Smith v. Ameritech*, *129 F.3d 857, 863 (6th Cir. 1997)*.** Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. **See** Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. **See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, *475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.** The judge is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." ***Anderson v. Liberty Lobby, Inc.*, *477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.** A genuine issue for trial is presented when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." ***Id. at 252.***

B. The district court properly disposed of Hollister's claims based on negligence, but erred in failing to separately consider Hollister's breach of implied warranty claim

Hollister's original complaint asserts two distinct causes of action--negligence and breach of implied warranty. The former is a tort action and the latter is an action for breach of

contract. In evaluating Hollister's claims, however, the district court did not distinguish between the two. The district court's summary disposition of Hollister's negligence claim was proper. Hollister failed to offer any evidence of negligence on Dayton Hudson's part, such as proof that the retailer knew of the shirt's extreme flammability or that it had received consumer complaints about the shirt in the past. An implied warranty claim, on the other hand, does not require a plaintiff to prove that the retailer was negligent--only that the product was defective and that the defect caused her injury.

Hollister has not been particularly helpful in bringing this distinction to the court's attention. Indeed, in her appellate brief, she incorrectly states that "under Michigan law, negligence and breach of warranty claims for design defect in product liability cases are judged by the same standard, i.e., a pure negligence risk-utility test." Thus, Hollister has argued her two causes of action as if the negligence standard governed both.

Hollister's and the district court's confusion as to the appropriate legal standard most likely stems from the fact that, in cases where a seller is also the manufacturer, Michigan courts have observed that claims of negligence and breach of implied warranty are, for all intents and purposes, identical. The reason for this confluence is that a plaintiff alleging breach of implied warranty on the part of a seller must show that the purchased product was defective. That showing, in turn, requires proof that the product's manufacturer acted negligently, typically by omitting a safety feature or in failing to give warning of a latent danger. A suit for breach of implied warranty against a seller who is also the manufacturer will therefore require the same showing of negligence on the defendant's part as an ordinary products liability suit against a manufacturer. See ***Prentis v. Yale Mfg. Co., 421 Mich. 670, 365 N.W.2d 176, 186 (Mich. 1984); Smith v. E. R. Squibb & Sons, Inc., 69 Mich. App. 375, 245***

N.W.2d 52, 56 (Mich. Ct. App. 1976), **aff'd**, *405 Mich. 79, 273 N.W.2d 476 (Mich. 1979)*

When the defendant is a **non**-manufacturing seller, however, the two analyses diverge. **See** ***Prentis***, *365 N.W.2d at 186 n.30* ("Thus . . . the only time the distinction between implied warranty and negligence may have any significance in design defect cases, is in determining the liability of a seller who is not also the manufacturer of a product."). Because the existence of a defect is generally determined by the negligent conduct of the manufacturer, a retailer may be held liable for breaching its implied warranty of merchantability by selling a defective product, even if the retailer's conduct is wholly free from negligence. **See** ***Johnson v. Chrysler Corp.***, *74 Mich. App. 532, 254 N.W.2d 569, 571 (Mich. Ct. App. 1977)* (reversing a directed verdict in favor of the retailer of a defective power punch press, even though the retailer was not negligent); ***Piercefield v. Remington Arms Co.***, *375 Mich. 85, 133 N.W.2d 129, 134 (Mich. 1965)* (holding that a breach of implied warranty claim relating to the sale of a defective shotgun shell could be established without proof of negligence on the part of the retailer). **Cf.** ***Marcon v. Kmart Corp.***, *573 N.W.2d 728 (Minn. Ct. App. 1998)* (affirming a verdict against the non-negligent seller of a sled, which was found to be defective because it lacked a warning advising riders not to kneel).

As noted above, Hollister has not argued at any stage of this litigation that her implied warranty claim requires distinct treatment from her negligence claim. Hollister's implied warranty claim, however, has been properly raised both below and on appeal--it was simply analyzed under the wrong legal standard. Ultimately, it is the district court's responsibility to apply the proper legal standard, regardless of the misconceptions by the parties. **See** ***Industrial Development Bd. v. Fuqua Indus. Inc.***, *523 F.2d 1226, 1240 (5th Cir. 1975)* ("[A] trial court has the ultimate responsibility to apply the law to the uncontested facts before

it."); ***Troupe v. Chicago, D. & G. Bay Transit Co.***, *234 F.2d 253, 261 (2d Cir. 1956)* (Frank, J., concurring) ("A litigant surely has the right to assume that a federal trial judge knows the elementary substantive legal rules, long established by the precedents, and that therefore the judge will act accordingly, without prompting by the litigant's lawyer."). We will therefore independently consider and apply the proper analysis to Hollister's implied warranty claim. **See *Empire Life Ins. Co. v. Valdak Corp.***, *468 F.2d 330, 334 (5th Cir. 1972)* ("Here, however, it is not one of the parties seeking to advance a new theory, rather, it is this court, in fulfillment of its duty to apply the correct law, that is seeking to put the case back on the right track.").

C.Breach of implied warranty

A plaintiff seeking to recover on a claim against a retailer for breach of implied warranty must establish two elements: (1) that the product was sold in a defective condition, and (2) that the defect caused her injury. **See *Piercefield,* *133 N.W.2d at 134.*** Hollister contends that the shirt in question was defective because it was made of a fabric that was dangerously flammable (design defect) and because it should have carried a warning advising wearers of its extreme flammability (failure to warn).

1. Hollister failed to establish a prima facie case of design defect

a.The district court applied the proper analysis to Hollister's allegations of design defect

Hollister argues on appeal that the district court held her to a higher burden than is required by the Michigan courts. The district court restated the Michigan law on design defect as requiring Hollister to produce evidence showing:

(1)that the severity of the injury was foreseeable by the manufacturer;

(2)that the likelihood of occurrence of her injury was foreseeable by the manufacturer at the time of distribution of the product;

(3)that there was a reasonable alternative design available;

(4)that the available alternative design was practicable;

(5)that the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by defendant's product; and

(6)that omission of the available and practicable reasonable alternative design rendered defendant's product not reasonably safe.

Our review of the district court's formulation convinces us that its restatement of Michigan law was correct. The test applied by Michigan courts to design defect claims is set out in ***Reeves v. Cincinnati, Inc.***, *176 Mich. App. 181, 439 N.W.2d 326, 329 (Mich. Ct. App. 1989).* Steps one and two of the district court's test--the foreseeability of serious injury and the likelihood that injury would occur--echo the language of **Reeves**, which held that "a prima facie case of a design defect premised upon the omission of a safety device requires first a showing of . . . the likelihood of occurrence of the type of accident . . . and the severity of injuries sustainable from such an accident." *439 N.W.2d at 329.*

Steps three, four, and five required Hollister to present evidence that a reasonable design alternative was available, that it was practicable, and that it would have reduced the risk of the accident at issue in the case. These requirements parallel the second half of the **Reeves** test, which calls for "a showing of alternative safety devices and whether those devices would have been effective as a reasonable means of minimizing the foreseeable risk of danger." **Id.**

Finally, step six of the district court's test, requiring that the product must be unreasonably dangerous in the absence of the alternative design, simply states the logical conclusion of steps one through five. We therefore conclude that the district court applied the correct test in adjudicating Dayton Hudson's motion for summary judgment based upon design defect.

b.Hollister failed to establish a prima facie case of design defect

Hollister's claim of design defect is primarily based upon the tests conducted by Dr. Hall, in which the exemplar fabric and fourteen other fabric samples were dragged across a hot burner at a prescribed rate. Those tests indicate that the exemplar fabric was significantly more flammable than other fabrics. Hollister presented no evidence, however, as to the availability of alternative fabrics when the shirt was manufactured, the cost of manufacturing the shirt with such fabrics, or the effect of a fabric change upon the wearability, durability, or appearance of the fabric. Her failure to submit such evidence is similar to the situation in ***Owens v. Allis-Chalmers Corp.***, *414 Mich. 413, 326 N.W.2d 372, 379 (Mich. 1982),* where the Michigan Supreme Court affirmed the grant of a directed verdict for the defendant when the plaintiff offered no information as to the practicability of a seatbelt on a forklift truck that had overturned on its operator.

In sum, Dr. Hall never presented a "proposed alternative design" with any specificity. His only recommendation was that the weight of the fabric should have been heavier. Ignoring for the moment his silence on the practicality of such a suggestion, Dr. Hall also admitted "that he could not articulate the exact effect on flammability of the changes" he proposed. The district court thus properly dismissed Hollister's claims to the extent that they were premised on the shirt's allegedly defective design. **See *Zettle v. Handy Mfg. Co., 998 F.2d 358, 362 (6th Cir. 1993)*** (affirming a grant of summary judgment and holding that the plaintiff had failed to present sufficient evidence concerning the effectiveness of a proposed alternative design for a power washer under Michigan law).

c.The district court's evaluation of other factors was inconsistent with Michigan law

Rather than rest its decision solely on Hollister's failure to meet the district court's formulation of requirements 3 through 6 of Michigan's risk-utility test, the district court also ruled against her on the alternate grounds of severity (requirement 1), foreseeability (requirement 2), and the alleged misuse of the shirt (one of Dayton Hudson's affirmative defenses). Because the district court's opinion was published, **see** *5 F. Supp. 2d 530 (E.D. Mich. 1998)*, and because we conclude that its rulings on these alternate grounds were erroneous, we discuss each of them below.

In Parts VI.A.1. & 2. of its opinion, the district court concluded, as a matter of law, that a manufacturer could not have foreseen either the likelihood of the accident suffered by Hollister or the severity of injuries that would result from such an accident. Hollister, however, presented credible evidence to the contrary. A 1985 CPSC report sets forth statistics on injuries resulting from apparel catching fire. The report indicates that kitchen ranges are a common source of ignition in accidents involving burning apparel. In fact, the

report refers to precisely the type of accident that occurred in the present case:

> Kitchen ranges were the second most common ignition source. Ignition occurred most frequently when adults were leaning against or reaching across a range while wearing shirts/blouses, when children were climbing on or playing with ranges while wearing pajamas, and when elderly women were cooking while wearing robes or housecoats.

Also included in the report are statistics showing the number of injuries, by age group, that result from shirts' igniting on stove tops. In concluding that Hollister had not presented sufficient evidence regarding the magnitude of the risk involved, the district court noted that the CPSC report was from 1985, four to five years before Hollister's mother purchased the shirt in question. It did not explain, however, why the date of the report invalidates it as evidence. The district court then analyzed the statistics contained in the CPSC report and determined that there would be 123 injuries per year to persons in Hollister's age group that might match the severity of the injury that she incurred. It concluded, without citation or explanation, that "these are small numbers indeed." The district court thus judged the sufficiency of the evidence presented, which is generally a question for the jury, not the court. **See *Zettle,* *998 F.2d at 360.***

The CPSC report also considered the severity of injuries that result when clothing catches fire: "Over one third of all clothing-related burn victims were hospitalized. This fact becomes dramatic when compared to the 4 percent hospitalization rate for all consumer product-related injuries . . . and the 8 percent reported for all burn injuries." Furthermore, Hollister presented evidence that the fabric in

question would ignite upon contact with an electric burner and be consumed within seconds. In addition to the test comparing strips of fabric, her videotape shows the flames shooting above the shoulders of an exemplar shirt that her expert burned in its entirety. Hollister's demonstration that the shirt would burn quickly and intensely, coupled with the CPSC's report on hospitalization from clothing burns, creates a question of fact for the jury on the issues of severity and foreseeability.

As yet another alternative ground for its holding, the district court opined that Hollister's own actions would preclude her from relief based on her alleged misuse of the clothing. Manufacturers, however, have a duty to warn consumers of the dangers associated with foreseeable misuses of the products they produce. **See *Shipman v. Fontaine Truck Equip. Co., 184 Mich. App. 706, 459 N.W.2d 30, 33 (Mich. Ct. App. 1990)*** (reversing a trial court's entry of judgment notwithstanding the verdict in favor of the manufacturer of a feed truck, where there was evidence suggesting that the manufacturer reasonably could have foreseen the unsafe modification that the plaintiff made to the truck). As noted above, the CPSC study at least demonstrates the existence of a genuine issue of material fact as to whether accidentally brushing a stove burner, as Hollister did, is a foreseeable misuse of clothing.

2. Hollister successfully established a prima facie case that the shirt was defective because it lacked a warning regarding its extreme flammability

Hollister's second basis for asserting that the shirt was defective, and therefore sold in breach of Dayton Hudson's implied warranty of merchantability, is her claim that the shirt required a warning regarding its extreme flammability. Dayton Hudson counters that for Hollister to make out a failure to warn claim, she must first show that the shirt was

defectively designed. It therefore maintains that Hollister's inability to establish a prima facie case of design defect is necessarily fatal to her claim. We find that Michigan law is contrary to Dayton Hudson's argument.

Conceptually, the two claims identify different types of defect. A design defect is the mark of a poorly designed product, which could reasonably have been designed in a safer manner. The category of failure to warn, on the other hand, applies to a product that may be designed in an optimally safe way, but nevertheless bears a latent danger that would not be apparent to an ordinary consumer. For example, without a warning as to its weight restrictions, a highway bridge might be legally "defective" even if it was designed safely and was in perfect working order. **See *Wilson v. Bradlees of New England, Inc.***, *96 F.3d 552, 559 (1st Cir. 1996)*. Similarly, a prescription drug might be well designed and effective for its intended use, but it would nevertheless be legally "defective" if it lacked appropriate warnings as to its proper dosage and possible side effects. **See** Restatement (Second) Torts § 402A, comment h (1972); **see also *Barry v. Don Hall Labs.***, *56 Ore. App. 518, 642 P.2d 685, 688 (Or. Ct. App. 1982)* (holding that properly manufactured vitamins might still be found defective due to the absence of a warning as to their high sugar content).

Under Michigan law, design defect claims and failure to warn claims are governed by distinct analyses. **See *Gregory v. Cincinnati Inc.***, *450 Mich. 1, 538 N.W.2d 325, 329 (Mich. 1995)* (holding that a manufacturer's failure to warn can support a product liability claim "even if it the design chosen does not render the product defective."); ***Glittenberg v. Doughboy Recreational Indus.***, *441 Mich. 379, 491 N.W.2d 208, 216 (Mich. 1992)* (cautioning that "design defect analysis must not be used to evaluate failure to warn claims"). In the present case, the most relevant difference between the two claims is that a prima facie case of design defect requires that the plaintiff propose a reasonable

alternative design, but a failure to warn claim does not. Thus Hollister's failure to propose a safer, alternative design for the rayon blouse, which was fatal to her design defect claim, does not support a grant of summary judgment against her claim for failure to warn.

In order to establish, under Michigan law, that a product is defective due to a failure to warn, a plaintiff must demonstrate that a manufacturer (1) had actual or constructive knowledge of the alleged danger, (2) had no reason to believe that consumers would know of this danger, and (3) failed to exercise reasonable care to inform consumers of the danger. **See *Glittenberg, 491 N.W.2d at 212-13*** (holding that the dangers of diving headfirst into a manufacturer's aboveground swimming pool were open and obvious). If a product's danger is open and obvious to a reasonable consumer, the manufacturer has no duty to warn. **See id.** at 213. In such a case, a retailer who sells the product cannot be found liable for breach of implied warranty because the product is not defective.

The district court disposed of Hollister's failure to warn argument in a cursory manner, concluding that the danger inherent in having clothing come into contact with a hot stove is "open and obvious." We find this analysis to be oversimplified. It is true that a reasonable person would know that clothing is flammable; the question, however, is one of degree. **See *Michigan Mut. Ins. Co. v. Heatilator Fireplace, 422 Mich. 148, 366 N.W.2d 202, 205 (Mich. 1985)*** (holding that even if a reasonable consumer would know that covering the vents on a fireplace presented a "vague danger," a jury might still reasonably find that a warning was required to give the consumer "a full appreciation of the seriousness of the life-threatening risks involved"). A consumer might reasonably be expected to know that a rayon shirt will catch fire more easily and burn more quickly than a shirt made of heavy flannel. An ordinary consumer would have no way of knowing, however, that a particular rayon shirt was

substantially more combustible and flammable than another rayon shirt. **Cf.** ***LaGorga v. Kroger***, *275 F. Supp. 373 (W.D. Penn. 1967)* (denying a retailer's motion for judgment as a matter of law where the plaintiff charged the retailer with breach of implied warranty for selling him a jacket that was unusually flammable and lacked a warning, noting that "the **[**29]** public cannot be expected to possess the facilities or technical knowledge to apprehend inherent or latent dangers"), **aff'd**, *407 F.2d 671 (3d Cir. 1969).*

Hollister presented credible evidence that the exemplar fabric burned explosively, like newspaper, and that other comparable fabrics did not. In tests conducted by Hollister's expert, the exemplar fabric ignited instantly and burned completely within six seconds. Of the fourteen comparison samples, eleven failed to ignite at all when passed over a burner at the same rate. The three samples that did ignite were another 100% rayon sample and a rayon-polyester blend, both of which burned in about twelve seconds, and a piece of newspaper, which burned in four seconds. Thus the exemplar fabric burned twice as quickly as other rayon fabrics, and only two seconds slower than a piece of newspaper. A reasonable juror could conclude from this evidence that the shirt's manufacturer had a duty to know that the shirt possessed a latent danger, and a corresponding duty to warn consumers of that danger.

Once a plaintiff establishes that a product is defective--whether because of its design or because of a failure to warn--she must then demonstrate that this defect was a proximate cause of her injuries in order to make out a claim for breach of implied warranty. **See** ***Piercefield***, *133 N.W.2d at 134.* Hollister's mother stated in an affidavit that she would not have bought the shirt for her daughter if she had known that the shirt was extremely flammable, and Hollister herself maintained in an affidavit that she would not have worn the shirt in question if she had possessed such knowledge. A reasonable jury could find, based on this evidence, that the

shirt's failure to carry a warning was a proximate cause of Hollister's injuries.

In ***Deffebach v. Lansburgh & Bro.***, *80 U.S. App. D.C. 185, 150 F.2d 591 (D.C. Cir. 1945)*, the D.C. Circuit addressed a fact pattern quite similar to the one before us. That case involved an implied warranty claim against a non-manufacturing retailer who sold the plaintiff a chenille robe. Ignited by a spark as the plaintiff attempted to light a cigarette, the robe caught fire and burned explosively. The district court granted judgment as a matter of law to the retailer. On appeal, the D.C. Circuit reversed, holding that judgment as a matter of law was inappropriate because the plaintiff had produced evidence to satisfy both elements of an implied warranty claim--she had demonstrated that the robe was dangerously flammable and that the robe's unexpected flammability was a proximate cause of her injuries. **See**. *150 F.2d at 592.*

The Fourth Circuit's decision in ***Howard v. McCrory Corp.***, *601 F.2d 133 (4th Cir. 1979)*, is also instructive. In that case, a products liability action was brought by a mother whose infant son was fatally burned when his pajamas and bathrobe inexplicably caught fire. The mother sued the manufacturer and the retailer of the infant's pajamas, as well as the manufacturer and the retailer of his bathrobe, alleging strict liability, negligence, and breach of implied warranty. Judgment as a matter of law was entered in favor of the two retailers. The Fourth Circuit reversed for two distinct reasons, both of which are relevant to the instant case.

The district court had entered judgment in favor of Kresge, the retailer of the pajamas, because the plaintiff presented no expert testimony regarding the pajamas' flammability, only offering eyewitness testimony that the pajamas had ignited quickly and burned very rapidly. In reversing, the Fourth Circuit wrote:

> It has been held that, even where all the standard tests demonstrated that a product was not dangerously inflammable for use by infants, it is perfectly permissible for the jury to find that the product was dangerously inflammable from . . . proof that the product "ignited easily, (and) burned rapidly and intensely with a high degree of heat."

***Howard**, 601 F.2d at 137* (citing ***LaGorga**, 275 F. Supp. at 378).*

McCrory, the retailer of the bathrobe, was granted judgment notwithstanding the verdict on the grounds that remnants of the robe had been tested and found to meet the standards of Class I fabrics under the CPSC flammability test. The Fourth Circuit reversed this holding as well, reasoning that "compliance with federal standards, while plainly relevant, is not conclusive on the issue of McCrory's liability and the jury is entitled to consider any other relevant evidence on the issue." ***Howard**, 601 F.2d at 138.*

This last holding is particularly significant because Dayton Hudson cites the fact that the exemplar fabric met federal flammability standards as a factor supporting the grant of summary judgment. Although such evidence would undoubtedly be relevant evidence for Dayton Hudson to introduce at trial, it is not dispositive of Hollister's claim at this stage. **See id.**; ***Wilson v. Bradlees of New England, Inc.**, 96 F.3d 552 (1st Cir. 1996)* (holding that evidence of a garment meeting the federal flammability standards was relevant to, but not dispositive of, plaintiff's claims).

We therefore conclude that Hollister has established a prima facie case against Dayton Hudson for breach of implied warranty based upon a failure to warn, and that the district court erred in entering the grant of summary judgment on this claim. This is not to say, however, that

Hollister will necessarily prevail at trial. She will still have to convince a jury that the shirt was considerably more flammable than a reasonable consumer would expect. **See** ***Glittenberg****, 491 N.W.2d at 212-13.* She will also have to convince a jury that the lack of a warning on the shirt was a proximate cause of her injuries. **See** ***Moll v. Abbott Labs.****, 444 Mich. 1, 506 N.W.2d 816, 824 (Mich. 1993).* Finally, if Hollister does establish liability, the damages that Hollister sustained will be diminished in proportion to any amount of negligence attributed to her by the jury. **See** M.C.L. § 600.2949; ***Karl v. Bryant Air Conditioning Co.****, 416 Mich. 558, 331 N.W.2d 456, 462 (Mich. 1982)* (holding that the Michigan comparative negligence statute applies to breach of implied warranty actions). These hurdles are likely to be significant ones. We are convinced, however, that Hollister has the right to proceed to the next stage of the litigation.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the district court's entry of summary judgment on Hollister's negligence claim, **REVERSE** its entry of summary judgment on Hollister's breach of implied warranty claim to the extent that the claim is based upon a failure to warn, and **REMAND** for further proceedings consistent with this opinion.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-1660

Laura Hollister,
Plaintiff-Appellant,
American Community Mutual Insurance Company,
Intervenor,
v.
Dayton-Hudson Corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 96-73142--John Feikens, District Judge.
Argued: August 4, 1999
Decided and Filed: August 25, 1999
Before: SILER and GILMAN, Circuit Judges; GRAHAM, District Judge.(*)

COUNSEL

ARGUED: Steven P. Handler, McDERMOTT, WILL & EMERY, Chicago, Illinois, for Appellant. Barry B. Sutton, HARVEY & KRUSE, Troy, Michigan, for Appellee. **ON BRIEF:** Steven P. Handler, Charles M. Gering, McDERMOTT, WILL & EMERY, Chicago, Illinois, Robert P. Lynn, Jr., Mineola, New York, for Appellant. Barry B. Sutton, Dennis M. Goebel, HARVEY & KRUSE, Troy, Michigan, for Appellee.

OPINION

RONALD LEE GILMAN, Circuit Judge. Laura Hollister, a citizen of Michigan, was severely burned when the shirt that she was wearing ignited upon contact with a hot electric burner on her apartment stove. She brought a products-liability lawsuit based upon an alleged design defect against Dayton-Hudson Corporation, the Minnesota-based owner of the department store where the shirt was purchased. Finding that Hollister had failed to establish a *prima facie* case of design defect under Michigan's "risk-utility test," the district court granted Dayton-Hudson's motion for summary judgment.

The district court concluded that Hollister had failed to present any evidence of a reasonable alternative design that would have reduced the risk of the type of injury that she had suffered, as required under the risk-utility test. She also failed to present any evidence as to the cost of reasonable alternatives, or their effect on the product as a whole. Because these elements are required by Michigan caselaw to establish a *prima facie* case of design defect, we **AFFIRM** the district court's decision.

I. BACKGROUND

A. The accident

In November of 1995, Hollister was a business student at Northwestern University in Evanston, Illinois. On November 4, 1995, she attended a business-school party with her friend Jerome Joliet. She later returned to her apartment accompanied by another friend, Diarmuid O'Connell, at approximately 1:45 a.m. According to O'Connell, Hollister was intoxicated when the two left the party. O'Connell left Hollister's apartment at approximately 2:10 a.m.

Hollister has no memory of subsequent events. The next thing that she can recall is seeing herself in the mirror at approximately 9:30 a.m. on November 5. Realizing that she was injured, Hollister phoned her parents in Michigan. According to Hollister's parents, she repeated the words "fire, burner, pasta." Hollister's parents asked her for the number of a friend and she supplied O'Connell's. After leaving a message on O'Connell's machine, Hollister's father asked his daughter for another number, and she supplied Joliet's. Mr. Hollister then left a message on Joliet's machine. Joliet arrived at Hollister's apartment at about 10:00 a.m. that day. Finding that Hollister was severely burned, Joliet called 911. Evanston Fire Department paramedics came immediately and treated Hollister.

A paramedic stated that the right front and rear burners of Hollister's stove were glowing red when he arrived. There was a bowl of cooked pasta in the sink, and a pot sitting on the stove between the burners. The fire department report concludes that the fire began in the kitchen. At the request of the fire department, the Bureau of Alcohol, Tobacco, and Firearms assisted in investigating the accident. The BATF report also indicates that the fire began in the kitchen. It concludes that the accident most likely occurred when Hollister reached for something in the cabinet above the stove (the door to which was open) and her shirt-tail, which was hanging loose, brushed against the burner and ignited. Hollister next apparently attempted to smother the flames on the counter, where burned cloth was found. The report states that there was evidence that she then attempted to extinguish the flames with water from the bathtub.

There was evidence that after doing so, Hollister rested on her bed, where more burned clothing and bodily fluids were found. Small remnants of Hollister's shirt, a brown and black plaid button-down, were found. Hollister's mother stated that she had purchased this shirt for Hollister at a Hudson's department store six years earlier. Hollister was also wearing a T-shirt and bra under the large plaid shirt at the time of the accident. The report concludes that "the cause of this fire should be classified as accidental caused by ignition of the victim's clothing by the stove burner while she was cooking."

Hollister was brought to Evanston Hospital, where she was treated for third-degree burns over 55% of her body. She was later transferred to Loyola Hospital in Chicago, where she stayed until December 21, 1995. After treatment at Loyola, Hollister was transferred to the University of Michigan Medical Center in Ann Arbor, Michigan, where she remained until April 17, 1996.

As a result of her burns, Hollister has undergone comprehensive skin grafting to most of her upper body, as well as plastic and reconstructive surgery. She remains profoundly disfigured. Her medical expenses at the time of the district court's ruling in May of 1998 amounted to approximately $980,000.

B.Procedural background

On March 27, 1996, Hollister's parents filed this products-liability lawsuit in the Circuit Court of Wayne County, Michigan. Dayton-Hudson (the parent company of the department store where the shirt was purchased), Ralph Lauren (which Hollister's mother originally believed to be the manufacturer of the shirt), Banana Republic (the retailer of the T-shirt), Victoria's Secret (the retailer of the bra), and General Electric (the manufacturer of the stove) were named as defendants. The complaint alleged that the shirt was defectively designed because it was dangerously flammable and because it did not provide a warning of its propensity to burn. On July 11, 1996, the case was removed to the United States District Court for the Eastern District of Michigan on the basis of diversity of citizenship. Pursuant to a July 31, 1997 motion, Hollister was substituted for her parents as the plaintiff.

On August 1, 1997, the district court held a status conference with all of the parties. At that time, the court noted that in the 16 months that the case had been in existence, a "whole lot of nothing" had taken place. At that point, the Hollisters had arranged for no expert witnesses other than a consultant who was going to conduct tests of various fabrics. The court directed Hollister to secure and disclose her experts, pursuant to Rule 26 of the Federal Rules of Civil Procedure, by September 1, 1997. A discovery deadline of October 31, 1997 was also set.

On September 1, 1997, Hollister submitted reports pursuant to Rule 26 from the following four experts: David Hall (textile expert), Edmund Knight (expert on cause and origin of the fire), Anna Dutka (economic damages expert), and Alan Hedge (stove design expert). Dr. Hall's report stated that he was still looking for "exemplar" fabric identical to the rayon used in the shirt in question, and that in his opinion the fabric was dangerously flammable. The report identifies the fabric as 100% rayon, loosely woven with 1.5 denier threads.

Dr. Hall offered no opinion as to the feasibility of using a different fabric to construct a similar shirt, and acknowledged that he had no expertise in the use of fabrics in clothing. He initially testified that the flammability test set forth in 16 C.F.R. § 1610 determines whether a fabric is "unreasonably dangerous." This section's purpose is "to reduce danger of injury and loss of life by providing, on a national basis, standard methods of testing and rating the flammability of textiles and textile products for clothing use, thereby discouraging the use of any dangerously flammable clothing textiles." 16 C.F.R. § 1610.1. Based upon their products' passing this test, Banana Republic and Victoria's Secret were eventually dismissed as defendants. Although Dr. Hall never tested the shirt remnants or "exemplar" fabric pursuant to 16 C.F.R. § 1610, Dayton-Hudson's expert did. The fabric passed the test. Despite this fact, Dayton-Hudson remained as a defendant. By October of 1997, however, Hollister had dismissed all of the other remaining parties.

In his deposition on October 31, 1997, Dayton-Hudson's cause expert, John Campbell, acknowledged that he had located an "exemplar" shirt composed of fabric identical to that used in the shirt

involved in the accident. Hollister's counsel subsequently purchased identical shirts to the one that Campbell had identified, and gave them to Dr. Hall for examination and testing.

Dr. Hall determined that the characteristics of the exemplar fabric were substantially identical to the shirt that Hollister had been wearing at the time of the accident. He then conducted a test comparing the exemplar fabric with 14 other fabrics. The test utilized a stove-top electric burner set at 1100-1160 degrees, and involved sweeping 3.5 by 10-inch strips of the various fabrics across the burner. Hall then timed the rate of ignition and burning, if any. The exemplar fabric ignited immediately, and burned completely within six seconds. Eleven of the 14 non-exemplar samples failed to ignite. The three samples that did ignite were another 100% rayon sample, a rayon-polyester blend (both of which took about 12 seconds to burn completely), and a piece of newspaper (which burned in 4 seconds).

At the close of discovery, Dayton-Hudson filed three motions for summary judgment. One of the motions focused upon the requirement that a plaintiff such as Hollister prove the effectiveness of a proposed alternative design. In response, Hollister acknowledged that she would not be calling an expert witness on the effectiveness of an alternative design. She claimed that this was a question of fact for the jury that did not require expert testimony. The district court subsequently held a hearing on January 5, 1998 to clarify Hollister's position, stating as follows:

> THE COURT: --you say that this is so clear, the risk of severe injury from a highly flammable fabric is so manifest, that no expert testimony is needed. That--that really made me open my eyes. You mean we can simply impanel a jury, and you can put on your proof without any testimony to show this?
>
> . . .
>
> MR. HANDLER: We mean it.

The district court then presented the parties with a list of six requirements necessary to establish a *prima facie* case of design defect under Michigan law.

After briefing by both parties, the district court granted Dayton-Hudson's motion for summary judgment on May 12, 1998. Hollister timely filed her notice of appeal to this court.

II. ANALYSIS

A.Standard of review

We review *de novo* the district court's grant of summary judgment. *See, e.g., Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The judge is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A genuine issue for trial is presented when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

B.The district court's six-part analysis comports with Michigan law in substance, if not in form

1.The elements of a design-defect case under Michigan law

The crux of Hollister's claim is that the shirt that she wore was defective because it was constructed of a fabric that was too highly flammable to be safe. In other words, Hollister argues that the dangerousness of the shirt is attributable to the "intentional design decisions of the manufacturer." *See Prentis v. Yale Mfg. Corp.*, 365 N.W.2d 176, 182 (Mich. 1984) (distinguishing design defects from manufacturing defects).

In *Owens v. Allis-Chalmers Corp.*, 326 N.W.2d 372, 378-79 (Mich. 1982), the Michigan Supreme Court held that a plaintiff in a design-defect case must present evidence of the magnitude of risks involved, and the utility and relative safety of proposed alternatives, in order to overcome the defendant's motion for summary judgment. The forklift operator in *Owens* was killed when the forklift he was driving overturned and pinned him beneath it. His wife argued that the forklift was defective because it lacked seatbelts. In granting a directed verdict for the defendant, the court stated that the plaintiff could not prevail because she had not shown that the presence of a seatbelt would have rendered the forklift safer. *See id.*

In *Prentis*, the Michigan Supreme Court built upon *Owens* and explicitly adopted a so-called "risk-utility" test for determining a manufacturer's liability. *See Prentis*, 365 N.W.2d at 186 ("Thus we adopt, forthrightly, a pure negligence, risk-utility test in products liability actions . . . where liability is predicated upon defective design."). The risk-utility analysis focuses upon whether a manufacturer "would be judged negligent if it had known of the product's dangerous design at the time it was marketed." *Id.* at 183.

In *Reeves v. Cincinnati, Inc.*, 439 N.W.2d 326 (Mich. App. 1989), a worker whose hand was crushed in a power press that unexpectedly cycled sued the press's manufacturer on a design-defect theory. Reeves demonstrated that sudden cycling of power presses was common and that injury resulting from such cycling could occur. He further presented evidence that a guard installed in front of the press would prevent injuries such as the one he had incurred, and that such guards only cost about $1 each. On the other hand, he did not provide evidence as to any costs that might be associated with redesigning the presses to accommodate the guards, or the exact statistical likelihood of injury. *See id.* at 329-30.

In reversing a directed verdict for the manufacturer, the Michigan Court of Appeals stated that the plaintiff had presented sufficient evidence to raise a question of fact for the jury as to the reasonableness of the power press's design. *See id.* at 330. The *Reeves* court succinctly articulated the following elements of a *prima facie* design-defect case under Michigan law:

> [A] prima facie case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injuries sustainable from such an accident. It secondly requires a showing of alternative safety devices and whether those devices would have been effective as a reasonable means of minimizing the foreseeable risk of danger. This latter showing may entail an evaluation of the alternative design in terms of its additional utility as a safety measure and its trade-offs against the costs and effective use of the product.

Id. at 329 (citing *Prentis).*

This court has previously applied the *Owens, Prentis,* and *Reeves* analysis in a design defect case under Michigan law. *See Zettle v. Handy Mfg. Co.,* 998 F.2d 358, 360 (6th Cir. 1993) (holding that the plaintiff had failed to present sufficient evidence concerning the effectiveness of a proposed alternative design in a products liability action against the manufacturer of a power washer).

In the present case, Hollister has sued the distributor of the shirt, not its manufacturer. The manufacturer of the shirt remains unknown. A distributor's liability is the same as that of the manufacturer in a design-defect case. *See Gregory v. Cincinnati, Inc.*, 538 N.W.2d 325, 339 (Mich. 1995).

2.The district court's six-part prima facie case

Citing *Owens, Prentis,* and *Reeves,* the district court characterized the Michigan law on design defect as requiring Hollister to produce evidence that shows:

> (1)that the severity of the injury was foreseeable by the manufacturer;

(2)that the likelihood of occurrence of her injury was foreseeable by the manufacturer at the time of distribution of the product;

(3)that there was a reasonable alternative design available;

(4)that the available alternative design was practicable;

(5)that the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by defendant's product; and

(6)that omission of the available and practicable reasonable alternative design rendered defendant's product not reasonably safe.

Hollister argues on appeal that this test held her to a higher burden than the risk-utility test employed by the Michigan courts. In particular, she states that Michigan's analysis is, in fact, no more than a complicated way of expressing the concept of "reasonable care." Although it is true that the Michigan risk-utility test is a way of determining whether manufacturers exercise reasonable care in their design decisions, it is also true that Hollister had to meet the requirements set forth in *Owens, Prentis,* and *Reeves* in order to survive summary judgment.

Our review of the district court's test and its opinion leads us to the conclusion that the district court laid out the same elements of a *prima facie* design-defect case that the Michigan courts require. Steps one and two of the district court's test--the foreseeability of serious injury and the likelihood that injury would occur-- simply restate the following language in *Reeves*: "a showing of . . . the likelihood of occurrence of the type of accident . . . and the severity of injuries sustainable from such an accident." 439 N.W.2d at 329. Steps three, four, and five required Hollister to present evidence that a reasonable design alternative was available, that it was practicable,

and that it would have reduced the risk of the accident at issue in the case. These requirements simply reiterate the second half of the *Reeves* test, requiring "a showing of alternative safety devices and whether those devices would have been effective as a reasonable means of minimizing the foreseeable risk of danger." *Id.*

Step six, stating that the product must be unreasonably dangerous without the alternative design that was available and practicable, expresses the requirement in *Owens* that the absence of the alternative design be the *cause* of the injuries. *See Owens*, 326 N.W.2d at 379 (holding that the plaintiff had failed to show the reasonableness of requiring a seatbelt in part because there was no evidence that it was practicable for forklift drivers to use a seatbelt in performing their tasks). We therefore conclude that the district court applied the correct test in adjudicating Dayton-Hudson's motion for summary judgment.

C.Hollister failed to establish a *prima facie* case of design defect

Hollister's case basically rests upon the test conducted by Dr. Hall in which the exemplar fabric and 14 other fabric samples were dragged across a burner set at between 1106 and 1160 degrees. Dayton-Hudson points out that a General Electric engineer stated that the stove in Hollister's apartment would burn at between 1500 and 1800 degrees when on the "high" setting (where it was set at the time the paramedics entered Hollister's apartment). Hollister states that Dayton-Hudson's expert was talking about *new* stoves, and that a used stove such as that in Hollister's apartment might burn at a lower temperature. She provides no support for this assertion, however, nor any justification for failing to conduct the test at the higher temperature.

In the absence of conditions more like those in Hollister's apartment, the utility of Dr. Hall's test is questionable. Because it was unknown at the close of discovery whether the alternative fabrics would burn on contact with a much hotter burner, it is impossible to say whether such fabrics would have reduced the risk of the accident at issue here. According to Dayton-Hudson, for example, wool has an

ignition temperature of over 1,100 degrees, which is right at the upper limit of Dr. Hall's test. As the district court noted, Hollister's own expert "stated that he could not articulate the exact effect on flammability of the changes Hollister claims would make the shirt safer." Although he asserted that changing the denier thread thickness of the fabric would have made it less flammable, Dr. Hall said that he would need a "crystal ball" to predict the extent of the change on flammability.

Furthermore, the district court correctly concluded that Hollister had presented no evidence whatsoever as to the availability of alternative fabrics when the shirt was manufactured, the cost of manufacturing the shirt with such fabrics, or the effect of a fabric change upon the wearability, durability, or appearance of the fabric. Hollister's failure to submit such evidence is similar to the situation in *Owens*, where the plaintiff offered no information as to the practicability of a seatbelt on a forklift. *See* 326 N.W.2d at 379.

In fact, Dr. Hall never presented a "proposed alternative design" at all, because he never specified the construction details of an alternative shirt. His only recommendation was that the weight of the fabric be heavier. Therefore, as a practical matter, there is no proposed alternative to compare to the shirt that Hollister wore at the time of the accident.

The lack of a specific proposed alternative is particularly damaging to Hollister's case in light of Dr. Hall's test results. Fabric B in the test, a 100% rayon sample that was heavier than the exemplar fabric, burned as quickly as the exemplar. Fabric C, a second 100% rayon sample that was heavier than the exemplar but lighter than fabric B, did not even ignite. Without exact weight specifications for the proposed alternative shirt, it is therefore impossible to determine the effect that an alternative fabric would have upon flammability.

Because Hollister failed to establish a nexus between the manufacturer's choice of fabric and the injury, or the practicability of an alternative fabric, she was unable to demonstrate that the shirt was "not reasonably safe." Her burden was all the greater because, as previously stated, the exemplar fabric actually passed the federal

flammability test set forth in 16 C.F.R. § 1610. She therefore failed to make out a *prima facie* case of design defect under Michigan law.

D.The district court's evaluation of other factors was inconsistent with Michigan law

Rather than rest its decision solely on Hollister's failure to meet requirements 3 through 6 of Michigan's risk-utility test, the district court also ruled against her on the alternate grounds of severity (requirement 1), foreseeability (requirement 2), the "open and obvious danger" doctrine (one of Dayton-Hudson's affirmative defenses), and the alleged misuse of the shirt (another Dayton-Hudson affirmative defense). Because the district court's opinion was published, *see* 5 F.Supp. 2d 530 (E.D. Mich 1998), and because we find that its rulings on these alternate grounds were erroneous under the circumstances of the case before us, we discuss each of them below.

1.Severity

In Part VI.A.1. of its opinion, the district court erred in concluding, as a matter of law, that the severity of Hollister's injuries from a burning shirt was not foreseeable. A 1985 report of the Consumer Products Safety Commission ("CPSC") states that "[o]ver one third of all clothing-related burn victims were hospitalized. This fact becomes dramatic when compared to the 4 percent hospitalization rate for all consumer product-related injuries . . . and the 8 percent reported for all burn injuries." Furthermore, Hollister presented evidence that the fabric in question would ignite on contact with an electric burner and be consumed within seconds. In addition to the test comparing strips of fabric, her videotape shows the flames shooting above the shoulders of an exemplar shirt that her expert burned in its entirety.

In *Zettle*, a panel of this court noted that once the plaintiff had demonstrated a risk of electrocution in the use of a pressure washer, passing the "severity test" was easier because a likely result of severe electric shock is death. *See* 998 F.2d at 363. Similarly, incurring severe burns is a likely result of being engulfed in flames. Hollister's demonstration that the shirt would burn quickly, coupled with the

CPSC's report on hospitalization from clothing burns, creates a question of fact for the jury on the foreseeability of severity.

2. Foreseeability

In Part VI.A.2. of its opinion, the district court erred in concluding, as a matter of law, that the likelihood of Hollister's injury was not foreseeable. Hollister presented the 1985 CPSC report setting forth statistics on injuries resulting from apparel catching fire. The report specifically indicates that kitchen ranges are a common ignition source in accidents involving burning apparel. In fact, the report refers to precisely the type of accident in which Hollister was involved:

> Kitchen ranges were the second most common ignition source. Ignition occurred most frequently when adults were leaning against or reaching across a range while wearing shirts/blouses, when children were climbing on or playing with ranges while wearing pajamas, and when elderly women were cooking while wearing robes or housecoats.

Also included in the report are statistics showing the number of injuries, by age group, that result from shirts' igniting on stove tops. In concluding that Hollister had not presented sufficient evidence regarding the magnitude of the risk involved, the district court noted that the CPSC report was from 1985, four to five years prior to the purchase of the shirt. It did not explain, however, why the date of the report invalidates it as evidence. The district court then analyzed the statistics contained therein and concluded that there would only be 123 injuries per year in Hollister's age group that might match the severity of the injury that she incurred. It concluded, without citation or explanation, that "these are small numbers indeed." The district court thus judged the sufficiency of the evidence presented, which is properly a question for the jury, not the court. *See Zettle,* 998 F.2d at 360.

3. "Open and obvious danger" doctrine

In Part VI.C. of its opinion, the district court opines that Hollister should not prevail in a case such as this one because the danger from clothing touching a hot stove is "open and obvious." We find this to be a misapplication of the "open and obvious danger" doctrine, which was articulated in *Fisher v. Johnson Milk Co., Inc.*, 174 N.W.2d 752 (Mich. 1970). In that case, the plaintiff slipped on a patch of ice and dropped a wire carrier full of glass milk bottles. The bottles broke, injuring him. The plaintiff claimed that the manufacturer should have placed a bottom on the carrier, which would have prevented glass fragments from scattering when the case was dropped. *See id.* at 752-53. In affirming the grant of summary judgment for the defendant, the Michigan Supreme Court stated that the danger of bottles breaking when dropped was obvious to everyone, and that there was no duty to construct the carrier differently or to warn consumers. *See id.*

The "open and obvious danger" doctrine set forth in *Johnson Milk* is not applicable in the present case because the relative flammability of clothing is not obvious to the average consumer. Although the danger of a shirt's igniting when placed in contact with a hot stove is obvious, the relative flammability of one shirt versus another is not. Hollister alleged that the exemplar fabric burned explosively, like newspaper, but that other fabrics did not. Had she established a *prima facie* case, she would not have been hindered by the "open and obvious danger" doctrine.

4. Misuse

The district court further opined in Part VI.C. that Hollister's own actions ought to preclude her from relief, based on Hollister's alleged misuse of the clothing. Manufacturers, however, have a duty to warn consumers of the dangers associated with foreseeable misuses of the products they produce. *See Allen v. Owens-Corning Fiberglass Corp.*, 571 N.W.2d 530, 534-35 (Mich. App. 1997). Hollister's failure-to-warn claim explicitly states that had she known that the consequences of a mishap such as hers would be so high, she would not have worn the shirt. As noted above, the CPSC study indicates

that accidentally brushing a stove burner as Hollister did is a foreseeable misuse of clothing.

Furthermore, the district court held, without support, that Hollister was a "careless user" of the clothing. Although the manufacturer is not liable for every possible misuse of its product, *see Owens*, 326 N.W.2d at 379, the district court was not entitled on the record before us to conclude as a matter of law that Hollister's alleged misuse was so grievous as to deprive her of the right to pursue a design-defect lawsuit. We therefore conclude that Hollister's alleged misuse and carelessness were not proper issues to be decided by summary judgment in the case before us.

III. CONCLUSION

In sum, we **AFFIRM** the decision of the district court based upon Hollister's failure to present evidence that a reasonable alternative design was available, that it was practicable, that it would have reduced the risk of the accident at issue, and that the absence of the alternative design was the cause of her injuries. On the other hand, we find that the district court's rulings on severity (Part VI.A.1.), foreseeability (Part VI.A.2.), the "open and obvious danger" doctrine (Part VI.C.), and misuse (Part VI.C.) are not consistent with Michigan law.

FOOTNOTES

*The Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

Civil Action No. 96-73142

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

LAURA HOLLISTER,
Plaintiff,

v.

DAYTON HUDSON CORPORATION,
a foreign corporation, Defendant.

May 12, 1998, Decided

May 12, 1998, Filed

COUNSEL:
For Plaintiff: Robert P. Lynn, Jr., Mineola, NY.

For Plaintiff: Harvey Chayet, Local Counsel, Thurswell, Chayet & Weiner, Southfield, MI.

For Intervenor Plaintiff: Gary C. Rogers, Fraser, Trabilcock, David, Lansing, MI.

For Plaintiff: Steven P. Handler, Charles M. Gering, Co-Counsel, McDermott, Will & Emery, Chicago, IL.

For Plaintiff: Gary C. Rogers, Int. Counsel, Fraser, Trabilcock, David, Lansing, MI.

For Ralph Lauren, Defendant: William J. Eaton, Rice, Galin & Traurig, Southfield, MI.

For Dayton Hudson, Defendant: Dennis M. Goebel, Harvey, Kruse, Troy, MI.

JUDGES:
John Feikens, United States District Judge.

OPINIONBY:
John Feikens

OPINION:

OPINION AND ORDER

I. INTRODUCTION

This is a design defect product liability case. To resolve its central issue, I must apply Michigan's risk-utility test, a test which balances the magnitude of risk in the use of a product with the utility of use of that product. The Michigan Supreme Court adopted the risk-utility test for design defect product liability cases in the landmark decision, *Prentis v. Yale Mfg. Co., 421 Mich. 670, 365 N.W.2d 176 (1984).* "Thus we adopt, forthrightly, a pure negligence, risk-utility test in products liability actions against manufacturers of products, where liability is predicated upon defective design." *Id. at 691.*

A. Reasoning behind Michigan courts' adoption of the risk-utility test.

The court in *Prentis* noted that

> while courts have accepted the social policy rationale that those injured by defective products should be compensated for their injuries . . . and have agreed that manufacturers can most effectively distribute

> the costs of injuries, they have never gone so far as to make sellers insurers of their products and thus absolutely liable for any and all injuries sustained from the use of those products.

Prentis, 421 Mich. at 682-83.[1] The court observed that questions relating to design defects and determinations when a product is not reasonably safe because of its design are "the most agitated and controversial issues before the courts in the field of products liability." *Id. at 684.* Appellate courts, attempting to differentiate between various theories of recovery in design defect cases, sought to devise well-articulated distinctions. *Id. at 685.* Other courts attempted to control the scope of liability in design defect cases. *Id.* The result is several opinions in which standards for liability in design defect cases have been carefully examined by courts and debated by judges. *Id.* There are four general categories for determining the meaning of defect in design defect cases: (1) the risk-utility analysis (associated with Dean Wade[2]), which focuses upon whether a manufacturer "would be judged negligent if it had known of the product's dangerous condition at the time it was marketed," (2) a comparison of risk and utility of the product at the time of trial, (3) a consumer expectations analysis, and (4) a combination of the risk-utility and consumer-expectations tests. *Id. at 685-86* (citations omitted). The court in Prentis noted that "the overwhelming consensus among courts deciding defective design cases is in the use of some form of risk-utility analysis." *Id. at 686.* It stated that the risk-utility analysis in the design defect context always involves assessment of decisions made by manufacturers when designing their products. *Id. at 686-87.* It observed that the law stands as a watchdog to ensure that manufacturers' product design decisions do not expose product users to *unreasonable* risk of injury. *Id. at 687* (emphasis added, citation omitted).

Thus, in design defect product liability cases courts seek to satisfy the societal goal of holding manufacturers and sellers accountable for the safety of their products by striking a balance between tort liability and strict liability for physical injury caused by products. *Prentis, 421 Mich. at 681.* "From their earliest application, theories of products liability have been viewed as **tort doctrines** which should not be confused with the imposition of absolute liability." *Id. at 682* (emphasis added). These theories are not strict liability theories. They do not impose liability without fault. "[A] plaintiff relying upon the rule [in product liability cases] must prove a defect attributable to the [manufacturer's product] and causal connection between that defect and the injury or damage of which he complains. When able to do that, then and only then may he recover against the manufacturer of the defective product." *Id.* (citing *Piercefield v. Remington Arms Co., 375 Mich. 85, 98-99, 133 N.W.2d 129 (1965).*

Michigan cases clearly do not say that simply because a plaintiff suffers a severe injury when using a product that liability must be imposed on the manufacturer of that product, *i.e.*, strict liability. Similarly, Michigan product liability cases do not infer negligence, based on severity of injury. Michigan cases do not impose on manufacturers the obligation to foresee all possible injury from their products. Society benefits most when product users bear appropriate responsibility for their use of products. Careless users of products should not be subsidized by more careful users through payment of higher product prices because of claims against manufacturers. The court in *Prentis* struck a balance between traditional negligence and strict liability when it adopted the risk-utility test to distribute burdens fairly between users and manufacturers of products. *421 Mich. at 690-91.*

B. Michigan law parallels the Proposed Restatement (Third).

Although Michigan has not adopted the Proposed Final Draft of the Restatement (Third) of Torts: Product Liability § 2 (April 1, 1997), the Michigan risk-utility test is consistent with the principles of section 2(b), which states:

> A product: . . . (b) is defective in design when the **foreseeable risks of harm** posed by the product could have been reduced or avoided by the adoption of a **reasonable alternative design** by the seller or other distributor, or a predecessor in the commercial chain of distribution, **and** the omission of the alternative design renders the product not reasonably safe;

RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 (Proposed Final Draft, 1997) (emphasis added). The reasoning in Michigan cases is consistent with the reasoning detailed in Comment a. to this section. Comment a. states that because design defects cannot be determined by reference to the manufacturer's standards (those being the very standards plaintiffs attack as unreasonable), "some sort of **independent assessment of advantages and disadvantages**, to which some attach the label 'risk-utility balancing,' is necessary. Products are not generically defective merely because they are dangerous." RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 (Proposed Final Draft, 1997), cmt. a. This comment states that trade-offs are necessary to determine costs more fairly and efficiently borne by those who incur them, and costs better borne by products users and consumers as a group through liability imposed on product sellers, with subsequent reflection of this liability in product prices. *Id.*

> Society benefits most when the right, or optimal, amount of product safety is achieved.

> From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use **prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices.**

Id. (emphasis added). In a fair and efficient liability system, the balancing of risks and benefits "in judging product design" must be done "in light of the knowledge of risks and risk-avoidance techniques **reasonably attainable at the time of distribution**" of the product. *Id.* (emphasis added).

C. Distributor/seller liability is the same as manufacturer liability.

This suit is against a distributor/seller of a product. In a design defect product liability case, a distributor's liability is the same as the manufacturer. *Gregory v. Cincinnati Inc., 450 Mich. 1, 34-35, 538 N.W.2d 325 (1995).*

II. CHOICE OF LAW

Plaintiff Laura Hollister's injury occurred in Illinois. When she filed this case, Hollister was (and still is) a Michigan citizen domiciled in Ingham County. Defendant Dayton Hudson Corporation (Hudson) is a foreign corporation doing continuous business in Michigan.[3] This court has diversity jurisdiction pursuant to *28 U.S.C. § 1332.* Venue is proper under *28 U.S.C. § § 1391*(a)(3) & (c). Thus, the substantive law of Michigan, including its choice of law rules, must be applied. *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-77, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).* Michigan's *lex fori* rule for

deciding choice of law issues in tort cases, as delineated in *Sutherland v. Kennington Truck Serv., Ltd., 454 Mich. 274, 562 N.W.2d 466 (1997); Olmstead v. Anderson, 428 Mich. 1, 400 N.W.2d 292 (1987);* and *Sexton v. Ryder Truck Rental, Inc., 413 Mich. 406, 320 N.W.2d 843 (1982),* requires this.

III. MICHIGAN'S PURE RISK-UTILITY TEST

In a design defect product liability case a plaintiff must show that the action is based on a design defect. *Prentis, 421 Mich. at 682-83.* Recovery for an injury caused by a defect in a product may be obtained if the product's design, the result of an intentional design decision of the manufacturer, is not sufficiently safe. *Id.*

Owens v. Allis-Chalmers Corp., 414 Mich. 413, 326 N.W.2d 372 (1982), and *Reeves v. Cincinnati, Inc., 176 Mich. App. 181, 439 N.W.2d 326 (1989),* are important cases in the evolution of the Michigan risk-utility test. In *Owens*, the Michigan Supreme Court stated that in order to state a prima facie case in a design defect product liability action, a plaintiff must present evidence as to both the magnitude of foreseeable risk involved in use of the allegedly defectively designed product and the reasonableness of a proposed alternative (safer) design. *Owens, 414 Mich. at 429.* Following *Owens* and *Prentis*, the court in *Reeves* stated:

> [A] prima facie case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of the injuries sustainable from such an accident. It [also] requires a showing of alternative safety devices and whether those devices would have been effective as a

> effective as a reasonable means of minimizing the foreseeable risk of danger. This latter showing may entail an evaluation of the alternative design in terms of its additional utility as a safety measure and its trade-offs against the costs and effective use of the product.

Reeves, 176 Mich. App. at 187-88 (citation omitted).

Under Michigan's risk-utility test, a plaintiff does not establish a prima facie case of product design defect if evidence of a reasonable alternative design, available and practicable at the time of distribution of defendant's product, is not produced. *Owens, 414 Mich. at 429-30.* Thus, in *Scott v. Allen Bradley Co., 139 Mich. App. 665, 671, 362 N.W.2d 734 (1984),* the court said, "*Owens* established that the plaintiff [in a design defect case] must present evidence concerning the magnitude of the [foreseeable] risks involved and the reasonableness of any proposed alternative design."

The court in *Owens* considered whether a forklift machine designed without seatbelts was defectively designed. Evidence showed that seatbelt modification would minimally affect design and utility, and present minimal cost to the manufacturer. However, testimony from forklift drivers revealed that even if seatbelts were installed on the forklifts, most drivers would not use them. The court then stated:

> Our conclusion that the plaintiff did not present a prima facie case [of design defect] is based on the lack of evidence concerning both the magnitude of the risks involved and the reasonableness of the proposed alternative design. Although from the testimony of plaintiff's expert one might infer that a forklift

> were foreseeable, neither his testimony nor any other evidence on the record gave any indication **how likely such an event might be**. In conjunction with this **uncertainty**, the record also produces no indication how the use of any of the driver restraints would affect a forklift operator's ability to do his or her job or the operator's safety in other circumstances. . . . Even if this Court could take judicial notice that the costs involved in attaching a seat belt or other designated restraint to a forklift would not be great, **we cannot take judicial notice that their use by forklift drivers would be likely, practical, or more safe.**

Owens, 414 Mich. at 429-30 (emphasis added). Thus, in the application of the risk-utility test, a court must also evaluate the **product user's** decisions and actions, and determine the user's contribution to the injury.

Reeves summarized the elements of a prima facie case where a failure to provide adequate safety devices is alleged in a design defect action: the plaintiff must show (1) the magnitude of the foreseeable risks (including (a) the **likelihood of the occurrence of the type of accident that precipitates the need for the safety device**, and (b) the severity of the injuries sustainable from such an accident), (2) an alternative safety device available and practicable at the time of distribution of the defendant's product, and (3) whether that device would have been effective as a **reasonable means** of minimizing the foreseeable **risks** of danger from the defendant's product (including evaluation of additional utility as a safety measure, additional cost, effect on consumer/user desired features, functionality, convenience, and any other features that drive consumer

convenience, and any other features that drive consumer demand for and acceptance of the product). *Reeves, 176 Mich. App. at 187-88 (1989)* (emphasis added).

A. What the plaintiff must show in this design defect product liability case.

Three cases, *Owens, Prentis*, and *Reeves*, require that the plaintiff produce evidence which shows:

> (1) that the severity of her injury was foreseeable by the manufacturer;
>
> (2) that the likelihood of occurrence of her injury was foreseeable by the manufacturer; at the time of distribution of the product:
>
> (3) that there was a reasonable alternative design available;
>
> (4) that the available reasonable alternative design was practicable;
>
> (5) that the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by defendant's product; and
>
> (6) that omission of the available and practicable reasonable alternative design rendered defendant's product not reasonably safe.

She must show that a reasonable alternative design, available and practicable at the time of distribution of the product at issue, at reasonable cost, would have reduced the foreseeable risks of harm posed by the product, **and** that omission of the

chain of distribution rendered the product not reasonably safe.

IV. BACKGROUND

During the early morning hours of November 5, 1995, plaintiff Laura Hollister (Hollister) sustained a severe burn injury. She alleges that a blouse she wore at the time of her accident caused her injury, that her mother purchased the blouse 6-7 years prior to the accident at a Hudson store, and that the blouse was unreasonably dangerous due to a design defect that caused the blouse to burn in an explosive manner.

On November 4, 1995, Hollister, then a graduate student at Northwestern University, went to a party near her home in Evanston, Illinois at approximately 11:00 p.m. Diarmuid O'Connell (O'Connell), a friend who walked Hollister from the party to Hollister's apartment, states she left the party intoxicated at approximately 1:45 a.m. on November 5, 1995. O'Connell states he left Hollister's apartment some time after 2:00 a.m., approximately 15-20 minutes after he and Hollister reached the apartment. Thereafter, apparently while alone in her apartment, Hollister sustained third degree burns to more than half her body. Medical care for her injury began when paramedics arrived at Hollister's apartment at approximately 10:30 a.m. the same day.

Hollister told one of the paramedics who attended her at her apartment that she was injured in a stove fire. Other than that she remembers nothing as to the party or the accident, until approximately 9:30 a.m. on November 5, 1995, the day after the party, when she looked in a mirror, and realized she was injured. She then called her parents at their home in East Lansing, Michigan. Hollister's parents phoned Jerome Joliet (Joliet), a friend who lived near Hollister. Joliet went to Hollister's apartment and, upon discovering her injured condition, immediately phoned for emergency medical service.

condition, immediately phoned for emergency medical service.

The Evanston Fire Department theorizes that the fire started in the kitchen, and that Hollister's blouse apparently ignited on an electric stove burner while she was cooking some food. The United States Bureau of Alcohol, Tobacco, and Firearms (BATF) investigated the fire at the Evanston Fire Department's request. The BATF report notes that firefighters who assisted the ambulance crew on November 5, 1995 observed the right front and right rear burners of Hollister's electric stove were still red hot. Examination of remnants of the blouse Hollister wore indicates it was made of 100% rayon. The remnants of the blouse do not indicate manufacturer or retailer identity.

The BATF report concluded that the cause of the fire was the ignition of Hollister's blouse by a stove burner while she was cooking. It also indicates that the investigator arrived at this hypothesis as to Hollister's actions, in part, by interviewing Hollister and having her reenact her movements.

Hollister sustained third degree burns to 55% of her body (virtually all of her upper body), and lost her nose, ears, chin, breasts, and most of her left thumb because of extensive injury to these areas. She has undergone, and continues to undergo, reconstructive surgery. She states she has incurred over $ 980,000.00 in medical expenses, and expects to incur substantial additional medical expenses. She seeks damages for necessary medical care; loss of work capacity and income; physical pain and suffering; mental anguish, fright, shock, and humiliation; mortification and embarrassment; disability and body disfigurement; and loss of social and recreational opportunities.

V. ISSUES

> Whether an alleged design defect is actionable under theories of negligence and implied warranty is decided with reference to the risk-utility balancing test. *Prentis, supra.* The precise **burden on plaintiff** was delineated by the Supreme Court in *Owens v. Allis-Chalmers Corp, 414 Mich. 413; 326 N.W.2d 372 (1982)* . . . . To summarize, **a prima facie case of a design defect** premised upon the omission of a safety device **requires** first **a showing of the magnitude of foreseeable risks, including** the **likelihood of occurrence** of the type of accident precipitating the need for the safety device and **the severity of the injuries sustainable from such an accident.**

Reeves, 176 Mich. App. at 185-87 (emphasis added). Hudson cites this passage in support of its answer that plaintiff is required to prove that the severity of her injury was foreseeable by the manufacturer.

Hollister admits, indirectly, that she is required to meet the "severity test," and cites *Zettle v. Handy Mfg. Co., 998 F.2d 358 (6th Cir. 1993),* in support of her assertion that once a plaintiff demonstrates that the type of injury suffered was foreseeable, the severity test becomes easier for the plaintiff to meet. The court in *Zettle* also states, however, that a "plaintiff [is] required to show the magnitude of risks foreseeable by defendant manufacturer . . . **including** the likelihood of [the type of injuries sustained by plaintiff] **and the severity of such injuries.**" *Id. at 362* (emphasis added). Hollister does not show that she has proof that the severity of her injury was foreseeable by the manufacturer at the time of manufacture.

She states, nonetheless, that she can prove that it was foreseeable that she would suffer a severe burn injury. She quotes language from a United States Consumer Product Safety Commission (CPSC) study stating that burns, particularly burns involving clothing, result in serious and painful injuries.[4] She presents a videotape in which her expert, David Hall (Hall), shows an exemplar blouse (non-identical to the blouse involved in the accident) that burned after contact with a hot electric stove burner, and shows other fabrics not burning, or not burning as quickly, as the exemplar blouse.

Hudson notes that Hollister does not present evidence showing that it was foreseeable by the manufacturer that she would sustain such a severe injury. Hudson states that Hollister's expert admitted that he could not offer proof on the nature of the injury likely to occur as a result of the alleged defect in the blouse. It points out that there is a wide range of possible outcomes following clothing ignition, and that despite the fact that clothing may catch fire, many such fires can be easily controlled or quickly extinguished. The fact that certain fabrics burn faster than others when placed in contact with a hot stove burner does not prove that the severity of Hollister's injury was foreseeable by the manufacturer. Hudson observes, and I agree, that Hollister submits no proof that the severity of the injury she sustained was foreseeable by the manufacturer.

2. Was the likelihood of occurrence of Hollister's injury foreseeable by the manufacturer?

Hollister states that Michigan law requires a manufacturer to design its product so as to eliminate any unreasonable risk of foreseeable injury. *Frentis, 421 Mich. at 692-93.* She fails, however, to mention the court's language immediately following her cited passage that states that **"a design defect is established by proof that the product is not reasonably safe for the uses intended,**

anticipated, or reasonably foreseeable." *Id. at 693* **[*538]** (emphasis added, citation omitted). Hollister then repeats her "crux of liability" argument.

Hudson replies:

> The precise **burden on plaintiff** was delineated by the Supreme Court in *Owens v. Allis-Chalmers Corp, 414 Mich. 413; 326 N.W.2d 372 (1982)* . . . . To summarize, **a prima facie case of a design defect** premised upon the omission of a safety device **requires** first a showing of the magnitude of foreseeable risks, **including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of the injuries sustainable from such an accident.**

Reeves, 176 Mich. App. at 185-87 (emphasis added); *see also Zettle, 998 F.2d at 362; Kirk v. Hanes Corp. of North Carolina, 16 F.3d 705 (6th Cir. 1994); Allen v. Verson Allsteel Press, 957 F.2d 275 (6th Cir. 1992); Siminski v. Klein Tools, Inc., 840 F.2d 356 (6th Cir. 1988).*[5] In its response to this question, Hudson cites *Fisher v. Kawasaki Heavy Indus., Ltd., 854 F. Supp. 467 (E.D. Mich. 1994),* which notes that a plaintiff in a design defect case must present evidence as to the likelihood (the probability) of occurrence of the type of injury plaintiff sustained, determined by how often the injury occurs with use of that product. *Id. at 470-71.* Hudson notes that Hollister's expert admitted that he could not give an opinion on the frequency of clothing burn injuries during either of the two years in which Hollister's mother may have purchased the blouse. Instead, Hollister turns to a report from the Consumer Product Safety Commission to support her assertion that the

likelihood of occurrence of her injury was foreseeable by the manufacturer.

Hollister must show that the likelihood of the occurrence of her injury was foreseeable by the manufacturer. She states it was foreseeable that her injury was likely to occur. She states that the blouse was dangerously flammable (based on her expert's testing of a non-identical exemplar blouse), and that it was foreseeable that a woman's blouse could be brought near sources of heat, including stove burners. But such conclusory statements do not constitute proof of foreseeability by the manufacturer of the likelihood of her injury. She must present proof that the type of injury she sustained occurs so commonly that it is reasonably foreseeable.

Hollister returns to the CPSC study for the statistic that an average of 3,200 clothing-related burn injuries were reported during each of the years the study covered. However, the same study notes that only 55% of these injuries were associated with "daywear," and only 40% of the daywear associated injuries were shirt/blouse associated. In other words, on average, only 704 shirt/blouse associated burn injuries occurred per year during the study years. Over 47% of the shirt/blouse associated injuries occurred in children under age 15 or adults over age 65. On average, only 373 shirt/blouse associated injuries per year occurred in the larger epidemiologic group including Hollister's age group. Finally, only 23-33% of the shirt/blouse associated burn injuries in that group were severe enough to require hospitalization, resulting in a total of only 123 shirt/blouse injuries per year, in Hollister's epidemiologic group, that might possibly match the severity of her injury. These figures are from the same CPSC study Hollister relies on in her pleadings. In the United States of America, a country with a population of over 245 million people in 1988 and over 247 million people in 1989, these are small numbers indeed.[6]

Hollister fails to present proof that the likelihood of occurrence of her injury was foreseeable.

3. At the time of distribution of the blouse, was a reasonable alternative design available?

Hollister answers that in a design defect case plaintiff may recover even if she does not prove that a reasonable alternative design existed at the time of manufacturer of the product. She cites *Prentis, 421 Mich. at 688,* to support this assertion. But this section of the *Prentis* opinion simply provides the court's review of the law concerning manufacturers' liability for design defects in many states. In subsequent language, the court states "We adopt, forthrightly, a pure negligence, risk-utility test in products liability actions against manufacturers of products, where liability is predicated upon defective design." *Id. at 691.* As Hudson noted, the court in *Reeves* explained:

> [A] prima facie case of a design defect . . . secondly **requires a showing of alternative safety devices and whether those devices would [*540] have been effective as a reasonable means of minimizing the foreseeable risk of danger.**

Reeves, 176 Mich. App. at 187-88 (emphasis added).

Hudson answers that although Hollister's expert did burn testing, she did not submit proof as to when the proposed alternative fabrics were manufactured, or whether such fabrics were available at the time of distribution of the blouse involved in this case. It also notes that Hollister has not submitted proof that alternative rayons were available that would have been significantly safer than the blouse involved in the accident.

Here, the "safety device" is the fabric of the blouse itself. Hollister must show that, at the time of distribution of the blouse involved in her accident, a reasonable alternative design was available. She states that the sample fabrics her expert tested were available at the time of distribution of the blouse, and that they were reasonable alternatives to the design of that blouse. She purports to prove this through tests in which her expert, David Hall, used and observed different fabrics for ignition and burning time when he moved them across the top of an electric stove burner. However, dramatic though they may be, Hall's burn tests do not prove that any of Hollister's proposed designs would have been reasonable alternatives (i.e., safer than the blouse she wore during the accident) under the circumstances in which she sustained her injury. Hollister has not shown that any of her proposed alternatives are indeed reasonable alternative designs. Therefore, she has not shown that a reasonable alternative design was available at the time of distribution of the blouse involved in the accident.

4. At the time of distribution of the blouse, was a reasonable alternative design practicable?

Both Hollister and Hudson admit that Hollister must show that, at the time of distribution of the blouse Hollister wore in the accident, a reasonable alternative design was practicable. Hudson cites *Owens, 414 Mich. at 429,* and *Fisher, 854 F. Supp. at 471-72,* in support of its affirmative answer. Hollister asserts that her proposed alternative designs were not only practicable, but actually in use at the time of distribution of the blouse involved in the accident. Even if her alternative designs were actually in use at the time of distribution of the blouse, Hollister has not shown that her proposed alternative designs are reasonable. Hudson notes that Hollister presents no proof on the effect that any of Hollister's proposed alternative designs would have on aesthetic quality, feel, fit, wear, longevity, maintenance, repair, costs, or marketability of the blouse involved in the

accident. Thus, Hudson asserts, and I agree, that Hollister has not shown that reasonable alternative designs were practicable at the time of distribution of the blouse.

5. At the time of distribution of the blouse, would the available and practicable reasonable alternative design have reduced the foreseeable risk of harm posed by the blouse?

Both Hudson and Hollister admit that Hollister must show that, at the time of distribution of the blouse, an available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by the blouse. Hollister states that the burn tests performed by her expert meet this burden. Hudson observes that the court in *Zettle*, a case involving fatal electrocution of a farmer while using an industrial power washing machine, noted that the plaintiff in a design defect case must demonstrate that her proposed alternative design "would have been effective as a reasonable means of minimizing the foreseeable risk of danger." *Zettle, 998 F.2d at 362.* As discussed earlier, Hollister has not demonstrated that the risk of sustaining her injury was foreseeable by the manufacturer. Hudson points out that Hollister's expert stated that he could not articulate the exact effect on flammability of the changes Hollister claims would make the blouse safer. The expert admitted that the expected effect was too speculative. Hollister fails to present evidence to show that, under otherwise identical circumstances, she would not have sustained the same injury while wearing a blouse made with one of her proposed alternative design fabrics.

6. Did omission of the available and practicable reasonable alternative design render the blouse not reasonably safe?

Hollister answers that she need not show that omission by the manufacturer of an available and practicable reasonable alternative design rendered the blouse she wore not

reasonably safe. She provides no case law to support her assertion. She simply states that the blouse was not reasonably safe, and that if the blouse was made from one of her proposed alternative designs her severe injury would not have occurred. However, the court in *Zettle* noted that although the plaintiff in that case presented evidence of a reasonable alternative design, because the plaintiff did not prove that omission of the proposed reasonable alternative design resulted in decedent's injury, the plaintiff did not satisfy the requirements of the Michigan risk-utility test. *Zettle, 998 F.2d at 362.* Hollister has not shown that wearing one of the alternative design blouses would have prevented her injury, and she has not shown that omission, by the manufacturer of the blouse she wore, of her proposed available and practicable reasonable alternative designs rendered the blouse in question not reasonably safe.[7] I cannot take judicial notice that one of Hollister's proposed alternative designs would be safer than the blouse involved in the accident.

B. Hollister fails the Michigan risk-utility test.

Hollister fails to present the proof required by the risk-utility test. Proof as to each of the elements of the test is necessary. That she was not able in this case to procure this proof through discovery, or through expert witnesses or technical data, or because no information exists as to the identity of the manufacturer, is answered by *Siminski v. Klein Tools, Inc., 840 F.2d 356 (6th Cir. 1988).* The court in *Siminski*, a case involving a carpenter's claim that the belt he wore was too narrow, and that this design defect was the cause of the fall that injured him, noted:

> Unlike manufacturing defects, design defects result from deliberate and documentable decisions on the part of manufacturers, and plaintiffs should be able to learn the facts

> surrounding these decisions through liberalized modern discovery rules. Access to expert witnesses and technical data are available to aid plaintiffs in proving the manufacturer's design decision was ill considered.

Siminski, at 358 (citing *Prentis, 421 Mich. at 689)*. Because Hollister cannot present a prima facie case of design defect, Hudson is entitled to summary judgment as a matter of law.

C. Other considerations in the court's analysis.

Other considerations in the evaluation of Hollister's evidence are (1) that blouses and stoves are so generally available and widely used by adults that instructions or warnings about the dangers of igniting a blouse on a hot stove burner are not necessary, even if the blouse involved in the accident posed significant risk of harm; (2) that the danger posed by using clothing directly over a hot stove burner is an open and obvious danger known to a reasonable adult; (3) that a reasonable adult would expect a blouse to burn if placed on a hot stove burner and thus would avoid doing so; (4) that by placing clothing in contact with a hot stove burner, an adult is misusing the clothing; and (5) that careless users of clothing should not be subsidized by more careful users of clothing by the cost of claims against manufacturers being passed on to more careful users through increased product prices.

CONCLUSION

For the reasons stated herein, Hollister fails to present a prima facie case of design defect; thus, defendant Hudson is entitled to summary judgment as a matter of law.

IT IS SO ORDERED.

John Feikens

United States District Judge

Dated: MAY 12 1998

----------Footnotes----------

[1] "Manufacturers are not insurers that 'in every instance and under all circumstances no injury will result from the use' of their products." *Owens v. Allis-Chalmers Corp., 414 Mich. 413, 432, 326 N.W.2d 372 (1982)* (quoting *DuPont de Nemours & Co. v. Baridon, 73 F.2d 26 (8th Cir. 1934).*

[2] *See* Wade, *On the Nature of Strict Tort Liability for Products, 44 MISS. L.J. 825, 834-35 (1973).*

[3] Laura Hollister's mother, Diane Hollister, allegedly purchased the blouse involved in the accident at the Hudson store in the Meridian Mall in Michigan in either 1988 or 1989.

[4] DEBORAH K. TINSWORTH, U.S. CONSUMER PROD. SAFETY COMM'N, HAZARD DATA RELATED TO THE FLAMMABILITY OF WEARING APPAREL (1985).

[5] Additionally, eight unpublished Sixth Circuit opinions that address the risk-utility test are consistent with these published cases.

[6] ECONOMICS AND STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 8 (117th ed. 1997).

[7] Hollister's difficulty in meeting the requirements of the risk-utility test to establish a prima facie case of design defect is compounded by the paucity of evidence presented regarding the blouse itself. Hollister presented no independent evidence of who the blouse manufacturer was or the year the blouse was manufactured. Although Hollister's mother stated she purchased the blouse at a Hudson store in the Meridian Mall six to seven years prior to the accident, neither Hudson nor Hollister has any written record of the purchase.

The weight of evidence that the blouse was purchased at a Hudson store is also problematic. In her deposition testimony,

Hollister's mother stated emphatically that the blouse was made of 100% cotton. However, when tested, the blouse remnants were shown to be composed of 100% rayon.

98-1660

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Laura Hollister,
Plaintiff-Appellant,

American Community Mutual Insurance Company,
Intervenor,

v.

Dayton Hudson Corporation,
Defendant-Appellee.

March 2, 2000, Filed

JUDGES: BEFORE: SILER and GILMAN, Circuit Judges; and GRAHAM, * District Judge.

OPINION: ORDER

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

----------Footnotes----------

* Hon. James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

Supreme Court, U.S.
FILED
JUL 31 2000
CLERK

No. 99-1927

IN THE
Supreme Court of the United States

TARGET CORPORATION,

Petitioner,

v.

LAURA HOLLISTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT LAURA HOLLISTER

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U.S. Sup. Ct. R. 10 1

Respondent, Laura Hollister ("Hollister" or "Respondent"), respectfully files her opposition to the Petition for Writ of Certiorari of Petitioner, Target Corporation, formerly known as Dayton Hudson Corporation ("Dayton Hudson" or "Petitioner") to review the judgment of the United States Court of Appeals for the Sixth Circuit in *Hollister v. Dayton Hudson Corporation*, 201 F.3d 731 (6th Cir. 2000).

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that review on a writ of certiorari is not a matter of right, but of judicial discretion, and that this Court may grant such a petition only for compelling reasons. Pursuant to Rule 10, compelling reasons may exist, *inter alia*, if: (i) a decision prompting the petition creates a conflict of authority between the courts of appeal and/or state courts of last resort; (ii) the United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court; or (iii) the lower court's decision departs from the usual course of judicial proceedings.

Dayton Hudson has not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. Indeed, the Court rarely exercises this discretion when the alleged error is the misapplication of a properly stated rule of law. Here, Petitioner contends that the Sixth Circuit's decision does not comport with Michigan law, and requests the extraordinary relief that this Court modify the holding in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). If this Court were to accept Petitioner's argument, virtually every case in which a federal court applied state law would

be appropriate for review by this Court. Moreover, the Sixth Circuit's decision does not conflict with Michigan State Law, but is derived from the Michigan Supreme Court holdings in *Piercefield v. Remington Arms Company*, 375 Mich. 85, 133 N.W.2d 129 (Mich. 1965) and *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 365 N.W.2d 176 (1984).[1]

STATEMENT OF THE CASE

Petitioner's Statement of the Case includes numerous mischaracterizations and misstatements of fact. Respondents offer the following to correct the record.

A. THE ACCIDENT

Petitioner alleges that Hollister was "injured in a mysterious fire" and that the "circumstances of the fire are unknown". (Pet., p. 4) This conveniently omits the fact that both the Evanston Fire Department and the United States Bureau of Alcohol, Tobacco and Firearms ("ATF") investigated the fire. The Evanston Fire Department Incident Report concluded that the fire started in Hollister's kitchen when Hollister's clothing was ignited while she was cooking. These findings were confirmed by the ATF. The ATF Investigator made the following findings regarding the origin of the fire, and Hollister's actions after her shirt caught fire:

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1. The *Piercefield* decision remains the law in Michigan, and has been cited favorably in some one hundred and sixty-four cases and treatises since 1965. This includes *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 365 N.W.2d 176 (Mich. 1984), a case upon which Dayton Hudson principally relies.

The origin of the fire was in the kitchen. The victim's clothing was apparently ignited by the burner on the electric stove while she was cooking. Firefighters arriving to assist the ambulance crew reported that the right front and right rear burners were red hot. Ms. Hollister was wearing a plaid shirt that buttoned up the front and a second pullover top under that. She was apparently not wearing any skirt or slacks so the shirttail may have moved onto the burner while she reached into a cabinet over the stove. The fire spread on her clothing and some burned cloth fell to the kitchen floor. She apparently attempted to put out the flames by leaning over the counter in an attempt to smother the flames. She next ran into the bathroom and attempted to put out the flames using water from the tub, more of the burning material fell to the floor in the bathroom and burned the center of a small throw rug and the tile floor beneath it. The victim then filled the tub and soaked in it because more burned clothing was found in the tub full of water. The tub apparently overflowed soaking the carpeting in the hall and damaging the bottom of the plasterboard walls. The victim subsequently went to her bedroom and rested on the bed as more burned clothing (some wet) and some evidence of body fluids were visible there. These observations were made from the combination of eye witnesses, fire fighters, and the evidence of normal fire progression during the origin and cause determination.

(Joint Appendix ("JA") A0493) Based upon the above findings, the ATF investigator concluded:

> After careful examination of this fire scene along with any relevant reports it is my opinion that the cause of this fire should be classified as accidental caused by ignition of the victim's clothing by the stove burner while she was cooking.

(JA 0493)

Due to the severity of the fire, few remnants of the shirt remained. They only consisted of a cuff, a piece of the front of the shirt with a button hole and button, and a single-ply piece. Due to the severely deteriorated condition of the remaining pieces, it was impossible to determine the manufacturer. It is not true, as Dayton Hudson states at page 5 of the petition, that "Plaintiff never disclosed sufficient information for Hudson's, . . . , to identify the manufacturer of the blouse or to verify whether it even sold the blouse." Both plaintiff's and defendant's experts examined the remnants, and neither was able to determine the manufacturer. In addition, it was Dayton Hudson, as conceded in their interrogatory responses, who failed to retain records dating back to 1988 sufficient to determine when it sold the blouse, or the blouse's manufacturer. (JA A0496-0498)

B. THE BURNER TESTS

Dayton Hudson's petition challenges Hollister's burner tests performed by plaintiff's fabric expert, Dr. David Hall, Professor Emeritus of Textile Engineering at Auburn University, and implies (as it does throughout the Petition)

that it somehow did not receive a "fair shake". Dayton Hudson asserts it "has never had discovery on the tests, nor has it been allowed to challenge the admissibility of the test . . . ." (Pet., p. 6 n.2) However, this assertion is disingenuous. The Sixth Circuit's amended opinion properly noted that Dayton Hudson's own expert initially identified the exemplar fabric and concluded it was identical to the subject fabric. The opinion states:

> In his deposition on October 31, 1997, Dayton Hudson's causation expert, John Campbell, acknowledged that he had located an "exemplar" shirt composed of fabric identical to that used in the shirt involved in the accident. Hollister's counsel subsequently purchased identical shirts to the one that Campbell had identified, and gave them to Dr. Hall for examination and testing.
>
> Dr. Hall determined that the characteristics of the exemplar fabric were substantially identical to the shirt that Hollister had been wearing at the time of the accident.

(App. pp. 6a-7a)

The exemplar fabric tested by Dr. Hall and originally identified by Dayton Hudson's expert, Mr. Campbell, was purchased at a Dayton Hudson store.

C. FAILURE TO WARN

Hollister's failure to warn claim is predicated upon the assertion that the blouse burned explosively, and that had it contained a warning label, Laura Hollister's mother would

not have purchased the blouse. Petitioner alleges that Hollister "produced no evidence to support her failure-to-warn claim." Once again, Dayton Hudson is mistaken. The Amended Opinion cites a portion of Hollister's evidence as follows:

> Hollister's mother stated in an affidavit that she would not have bought the shirt for her daughter if she had known that the shirt was extremely flammable[2], and Hollister herself mentioned in an affidavit that she would not have worn the shirt in question if she had possessed such knowledge.[3] A reasonable jury could find, based on this evidence, that the shirt's failure to carry a warning was a proximate cause of her injuries.

(App. pp. 19a-20a)

D. THE DISTRICT COURT AND APPELLATE COURT DECISIONS.

On March 27, 1996, Hollister's parents filed the present action on her behalf in the Wayne County, Michigan, Circuit Court. It was removed to the United States District Court for the Eastern District of Michigan on July 11, 1996. The suit charged that Dayton Hudson was negligent and breached an implied warranty by selling a highly flammable shirt and by failing to warn of the shirt's dangerous flammability. Other defendants were originally named in the action, but were subsequently dismissed from the case. Hollister was eventually substituted for her parents as plaintiff in the action.

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2. Affidavit of Diane Hollister (JA A0529)

3. Affidavit of Laura Hollister (JA A0527)

On May 12, 1998, the District Court awarded Dayton Hudson summary judgment. (*See* App. pp. 23a-46a) On August 25, 1999, a panel of the Sixth Circuit Court of Appeals affirmed. (*See* App. pp. 22a-1 – 22a-16) On September 7, 1999, Hollister filed a Combined Petition for Panel Rehearing and Rehearing *En Banc*. Petitioner filed a response to Plaintiff's Petition for Rehearing *En Banc*. On January 13, 2000, the same panel filed an amended opinion, reversing summary judgment as to Plaintiff's failure to warn claim, but affirming summary judgment as to the design defect claim. (App. pp. 1a-22a) On January 27, 2000, each party filed a petition for rehearing *en banc*, which was circulated to the original panel members and all other active judges of the Court. On March 2, 2000, the Court of Appeals denied both parties' Petitions For Rehearing *En Banc*. (App. pp. 47a-48a) The opinion and order noted that the issues raised in the Petitions were fully considered upon the original submission and decision of the case.

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT'S OPINION IS CONSISTENT WITH MICHIGAN STATE LAW.

This Court need only review the Michigan State Supreme Court's decisions in *Piercefield v. Remington Arms Company*, 375 Mich. 85, 133 N.W.2d 129 (Mich. 1965) and *Prentis v. Yale Manufacturing Company*, 421 Mich. 670, 365 N.W.2d 176 (Mich. 1984), to confirm that an overhaul of the federal system is not necessary and that the principles articulated in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), were not offended by the Circuit's Amended

Opinion. The Circuit Court simply applied Michigan's long-standing rule of law recognizing that implied warranty and negligence are separate and distinct theories of recovery (*See Piercefield*, at 134, and *Prentis*, at 186), that may only converge when the reasonableness of a *manufacturer's* conduct is in issue and the factual focus is on the *adequacy* of the warnings provided by the manufacturer. (*Gregory v. Cincinnati Incorporated*, 450 Mich. 1, 11-12, 538 N.W.2d 325 (Mich. 1995), citing *Smith v. E.R. Squibb & Sons*, 405 Mich. 79, 89-91, 273 N.W.2d 476, 479 (Mich. 1979).)[4] Dayton Hudson's status as a non-manufacturing seller prevents the convergence of these two theories. (*Prentis*, 365 N.W.2d at 186 n.30.)

Petitioner asserts that the Amended Opinion "adopted liability without fault" (Pet. p. 17), and therefore, it ignored Michigan state law. The Amended Opinion does no such thing. Liability without fault, or strict liability,[5] was not addressed, much less mentioned, in the Circuit's opinion. The Court adhered to the mandates of the Michigan Supreme Court in *Piercefield* and *Prentis*, which both recognize that "concepts of negligence and fault, as defined by negligence standards, have no place in warranty recovery cases. Proof of negligence is unnecessary to liability for breach of implied warranty and the lack of it is immaterial to defense thereof." (*Piercefield*, 133 N.W.2d at 134; *cf. Prentis*, 365 N.W.2d at 186.)

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4. Dayton Hudson, as the retailer, did not provide any warnings with the blouse. (App. p. 19a)

5. Petitioner erroneously states, at p. 16, that "the court adopted strict liability against retailers."

Indeed, in reviewing the *Piercefield* decision, the Michigan Supreme Court in *Prentis*, followed its holding and quoted directly therefrom, stating in pertinent part: "Some quibbler may allege that this is liability without fault. It is not. . . ." The Court continued, and stated: "We do not agree . . . that this Court abandoned fault concepts in Piercefield. * * * Nor do we interpret the decision in Piercefield as an adoption of the concept of strict liability in tort." (*Id.* at 181 n.9)

The Amended Opinion does not adopt strict liability in tort. It simply recognizes, as the Michigan Supreme Court had before it, that Hollister's implied warranty/failure to warn cause of action focuses on the fitness of the product rather than the conduct of the manufacturer. *See Prentis*, 365 N.W.2d at 186 ("We do not dispute the generally recognized distinction between the elements of negligence and breach of warranty. We recognize that the negligence theory generally focuses on the defendant's conduct, requiring a showing that it was unreasonable, while warranty generally focuses upon the fitness of the product, irrespective of defendant's conduct.") Therefore, as the Circuit Court noted, the two causes of action identify different dangers associated with the product. Design defect addresses a product that could reasonably have been designed in a safer manner, whereas implied warranty/failure to warn "applies to a product that may be designed in an optimally safe way, but nevertheless bears a latent danger that would not be apparent to an ordinary consumer." (App. p. 17a)

In reversing the District Court on the implied warranty/ failure to warn claim, the Circuit adhered to the Michigan Supreme Court's holding in *Prentis*. The Circuit observed:

> A suit for breach of implied warranty against a seller *who is also the manufacturer* will therefore require the same showing of negligence on the defendant's part as an ordinary products liability suit against a manufacturer. ***See Prentis v. Yale Mfg. Co.***, 421 Mich. 670, 365 N.W.2d 176, 186 (Mich. 1984); ***Smith v. E.R. Squibb & Sons, Inc.***, 69 Mich. App. 375, 245 N.W.2d 52, 56 (Mich. Ct. App. 1976), **aff'd**, 405 Mich. 79, 273 N.W.2d 476 (Mich. 1979) (emphasis added)
>
> When the defendant is a ***non-manufacturing seller***, however, the two analyses diverge. **See, *Prentis***, 365 N.W.2d at 186 n. 30 ("Thus . . . the only time the distinction between implied warranty and negligence may have any significance in design defect cases, is in determining the liability of a seller who is not also the manufacturer of a product."). Because the existence of a defect is generally determined by the negligent conduct of the manufacturer, a retailer may be held liable for breaching its implied warranty of merchantability by selling a defective product, even if the retailer's conduct is wholly free from negligence. (citations omitted)[6]

(emphasis added)

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6. This is consistent with negligence law, which focuses on the defendant's conduct, requiring a showing that it was unreasonable, while warranty generally focuses on the fitness of the product, regardless of the defendant's conduct. *See Gregory v. Cincinnati Incorporated*, 450 Mich. 1, 538 N.W.2d 325, 329 n.8 (Mich. 1995); *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 692 (Mich. 1984).

Dayton Hudson's Petition disregards the aforementioned plain language of the Michigan Supreme Court and, instead, suggests that the holding in *Smith v. E.R. Squibb & Sons, Inc.*, 405 Mich. 79, 273 N.W.2d 476 (Mich. 1979), is controlling. Dayton Hudson states: "The panel's distinction, however, has no basis in Michigan law. The Michigan Supreme Court expressly rejected this distinction in *Smith v. E.R. Squibb & Sons, Inc.*, 273 N.W.2d 476 (Mich. 1979). . . ." (Pet., p. 19)

The above quote is not only an erroneous characterization of the law, but quite curious, given that the Michigan Supreme Court decided *Prentis*, the case which the Circuit relied upon in formulating the distinction between manufacturer and retailer, some five years after *Squibb*. Respondent fails to see how the *Squibb* holding could possibly "reject" the above "distinction" promulgated in *Prentis*, some five years *after Squibb*. Moreover, *Squibb* is inapposite to our facts, and not controlling, as it: (1) pertains to manufacturers and not retailers sued under breach of warranty or negligence, (2) addresses "adequacy" of warnings, not whether warnings were actually given, (3) is fact intensive, and (4) specifically states "Note should be made, however, that On different facts it could be prejudicial error Not to give the implied warranty instruction." (*Id.*, 273 N.W.2d at 480.)[7]

Rather than diverging from decisions of Michigan's highest and intermediate courts, the Circuit's Amended Opinion is consistent with Michigan state law. *Prentis* provides that an implied warranty claim does not require

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7. The jury in *Squibb* found the warnings adequate.

plaintiff to prove the retailer's negligence, but only that the product was defective and that the defect caused the injury.[8]

Lastly, Petitioner's citation, at Footnote 10, to several cases for the proposition that Michigan Federal and State Courts have unanimously held that claims of failure to warn against a non-manufacturing seller under either a theory of implied warranty or negligence are to be treated as claims of negligence, is misplaced.[9] Other than *Glittenberg v. Doughboy Recreational Industries*, 441 Mich. 379, 491 N.W.2d 208 (Mich. 1992), each case citation therein pertains to the liability of a manufacturer or involves the "adequacy" of a given warning. *Glittenberg* is the only case which pertains to a retailer, and the suit therein was dismissed based upon the open and obvious nature of the danger.

Dayton Hudson is simply wrong when it argues "The court of appeals adopted exactly what the Michigan Supreme Court had rejected: a divergent treatment of failure-to-warn claims under implied warranty and negligence theories." and "The Sixth Circuit pointed to no line of authorities or legislative developments that would justify ignoring *Squibb* and *Coy*[10]." (Pet., p. 19) The Sixth Circuit did not follow the

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8. It is well settled that failure to provide a warning can constitute a product defect. (*E.g., Gutowski v. M & R Plastics & Coating, Inc.*, 60 Mich. App. 499, 231 N.W.2d 456 (Mich. Ct. App. 1975); *Berkebile v. Brantly Helicopter Corp.*, 225 Pa. Super. 349, 311 A.2d 140 (1973).)

9. Petitioner included the identical footnote at p. 10 of its Combined Petition for Panel Rehearing and Rehearing *En Banc*. The Circuit found the many case citations therein unpersuasive.

10. *Coy v. Richard's Industries, Inc.*, 428 N.W.2d 734 (Mich. Ct. App. 1988), *appeal denied*, 432 Mich. 856 (Mich. 1989).

rule in *Squibb*, as it is inapplicable to this case. Rather, the Circuit examined the relevant Michigan state law, applied it to the facts, and reversed the District Court's grant of summary judgment on Hollister's implied warranty/failure to warn claim. The Amended Opinion does not in any way, shape or form constitute "new law" in Michigan, but adheres to well-reasoned and long-standing legal principles.[11]

II.

THE SIXTH CIRCUIT CONSIDERED ONLY THE EVIDENCE IN THE RECORD ON REHEARING.

Point II of Dayton Hudson's Petition asserts that the Sixth Circuit panel improperly considered "new evidence" in the form of the "Schulz Affidavit" upon rehearing (Pet., pp. 23-25), in contravention of Fed. R. Civ. P. 60(b) and Fed. R. App. P. 40(a)(2). However, Dayton Hudson fails to offer a single citation from the Amended Opinion where the panel referred to or specifically considered the Schulz affidavit. This is because the Amended Opinion does not make a single reference to "new evidence" offered on rehearing, or the Schulz affidavit.

Indeed, the Schulz affidavit merely provided the maximum operating temperatures of the electric burners on Hollister's stove. Each burner reached a maximum

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11. The Petition characterizes the *Piercefield* case as "stale". (Pet., p. 15) However, this case has been cited favorably in at least 164 cases since 1965, including *Prentis*, *Gregory* and *Glittenberg*, all cases upon which Dayton Hudson principally relies.

temperature of between 1,000 and 1,100 degrees Fahrenheit. This result is consistent with evidence already in the record and provided in Appellant's combined petition for panel rehearing and rehearing *en banc*.

The record included ample evidence concerning the temperature reached by burners on the high setting on General Electric ranges. More importantly, however, nothing in the panel's Amended Opinion suggests that it relied on the affidavit which Dayton Hudson characterizes as new evidence. Thus, no basis exists for Dayton Hudson's argument that the panel improperly relied on the affidavit in concluding that plaintiff's proof was sufficiently "credible" to permit a jury to consider her failure to warn claim.

III.

DAYTON HUDSON'S ASSERTION THAT THE SIXTH CIRCUIT VIOLATED ITS DUE PROCESS RIGHTS IS WITHOUT MERIT.

A. DAYTON HUDSON'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* ASSERTED THE IDENTICAL LEGAL ARGUMENT IT NOW FOISTS ON THIS COURT.

Dayton Hudson's petition asserts "[b]ecause the panel issued its amended opinion without having heard from Hudson's on so much as a single topic that was the subject of amendment, it can hardly be said that Hudson's was granted a meaningful opportunity to be heard." This statement is not supported by the facts. First, one has *no right* to be heard in opposition to a rehearing petition.

(*See* Fed. R. App. P. 35(e) and 40(a)(3)[12]) Absent a right to be heard, Dayton Hudson's due process rights certainly could not have been violated. Second, the Court need only review Dayton Hudson's Combined Petition for Panel Rehearing and Rehearing *En Banc* ("the Combined Petition") to confirm that Dayton Hudson presented the identical arguments, relying on the same cases, to the Sixth Circuit. Dayton Hudson's petition, at Points B(1), (2) and C, argues the Sixth Circuit's Amended Opinion conflicts with Michigan State Court holdings in, *inter alia*, *Smith v. E.R. Squibb*, *Prentis v. Yale Manufacturing*, *Gregory v. Cincinnati*, and *Coy v. Richards Industries, Inc.*

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12. Fed. R. App. P. 35(e) provides:

Rule 35. En Banc Determination

* * * *

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response.

Fed. R. App. P. 40(a)(3) provides:

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

* * * *

(3) Answer. Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

This is the identical argument Dayton Hudson previously asserted at Points II(B), (C), and (D), of its combined petition. (Defendant-Appellee's Combined Petition For Rehearing at pp. 7-12)[13] The Circuit considered Dayton Hudson's arguments and concluded the "issues raised" in the petitions were fully considered upon the original submission and decision of the case." (Pet., p. 48a) Therefore, as Dayton Hudson previously made the identical arguments to the Circuit Court that it now makes to this Court, Dayton Hudson cannot now suggest that it did not have an opportunity to be heard. Dayton Hudson presented its theory of liability to the circuit which was squarely rejected.

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13. Dayton Hudson's points on its Combined Petition in the Circuit Court were:

> B. Regardless of Whether the Theory Pleaded is Negligence or Breach of Implied Warranty and Regardless of Whether the Claim is one for Design Defect or Failure to Warn, the Same Proof is Required Against a Manufacturer.
>
> C. Regardless of Whether the Claim is Pleaded Under a Theory of Negligence of Implied Warranty, the Required Proof Against a Retailer is the Same, Especially in Failure to Warn Cases.
>
> D. Where, as Here, the Panel Concluded that Plaintiff Failed to Create a Genuine Issue of Material Fact Against the Manufacturer, the Retailer Must be Dismissed Due to the Derivative Nature of the Claim.

B. THE FAILURE TO WARN CLAIM WAS NEVER ABANDONED AND WAS INCLUDED BY BOTH PARTIES IN THE FINAL JOINT PRE-TRIAL STATEMENT.

Dayton Hudson's petition erroneously asserts that Hollister waived her failure to warn claim, as it was not included in the Final Joint Pre-Trial Statement (the "Statement").[14] Both parties addressed the failure to warn issue in the Statement. Hollister included as one of her contested legal issues, the following:

> Did Dayton Hudson have a duty to warn as to the specific nature and magnitude of the risk associated with the clothing it sold?

(Statement, at C-2, #14) Dayton Hudson also addressed this issue, and raised it in the Statement, under Tab C-3, listing as one of defendant's contested legal issues, the following:

> Did Hudson's have a duty to warn of the risk that clothing burns?

(Statement, C-3, #36)

The Sixth Circuit determined that this issue had "been properly raised both below and on appeal" and concluded that it was an issue for the jury. It rejected the District Court's application of the open and obvious doctrine, stating:

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14. Dayton Hudson made this identical argument to the Circuit in its Combined Petition at pages 2-4. The Circuit rejected this argument.

> The district court disposed of Hollister's failure to warn argument in a cursory manner, concluding that the danger inherent in having clothing come into contact with a hot stove is "open and obvious." We find this analysis to be oversimplified. It is true that a reasonable person would know that clothing is flammable; the question, however, is one of degree.

(citation omitted) (App. p. 18a)

As both parties raised the question of failure to warn in the Final Joint Pre-Trial Statement and the Circuit recognized the merits of the cause of action, it certainly cannot be said that this issue was waived.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for writ of certiorari should be denied in all respects.

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(3)

No. 99-1927

In the

Supreme Court of the United States

DAYTON HUDSON CORPORATION, NOW KNOWN AS TARGET CORPORATION,

Petitioner,

vs

LAURA HOLLISTER, AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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I. THE SIXTH CIRCUIT VIOLATED THE PRINCIPLES OF *ERIE RAILROAD CO. v. TOMPKINS*, 304 U.S. 64 (1938), WHEN IT ADOPTED A RULE OF LAW THAT THE MICHIGAN SUPREME COURT HAD EXPRESSLY REJECTED.

Plaintiff does all that she can in her response to confuse the issues raised in the petition of Target Corporation (previously known as Dayton Hudson Corporation and referred to in this reply as "Hudson's"). Hudson's can best straighten things out by first noting what Plaintiff does not argue. She does not dispute that this case implicates important federalism concerns. She does not dispute that in this case *Erie*'s importance justifies review. She does not dispute that the need for uniform guidelines in ascertaining state law justifies review. Instead, she confines her opposition to a single argument: the Sixth Circuit's decision was consistent with Michigan law because it permitted recovery in failure-to-warn claims without proof of negligence. Plaintiff's only argument is plainly wrong.

The fallacy in her argument is exposed by an overview of Michigan product liability law. Michigan recognizes two theories of recovery in this context, negligence and breach of implied warranty. Michigan also recognizes three types of claims that can be brought under either theory: manufacturing defect, design defect, and failure to warn. The required proof varies according to the nature of the claim asserted. This case centers on a failure-to-warn claim brought under an implied warranty theory – and only that law is pertinent.

Although Michigan courts distinguished in the distant past between negligence and implied warranty theories, modern courts have eliminated this distinction in failure-to-warn claims. The Michigan Supreme Court in 1979 merged the two theories. In *Smith v. E.R. Squibb & Sons, Inc.*, 273 N.W.2d 476, 480 (Mich. 1979), the court held that failure-to-

warn claims under either negligence or implied warranty theories "involve identical evidence and require proof of exactly the same elements," namely "reasonable care under the circumstances." *Squibb* involved a manufacturer, not a seller. The Michigan appellate court, however, broadened *Squibb*'s holding almost ten years later to include non-manufacturing sellers as well as manufacturers in *Coy v. Richard's Industries, Inc.*, 428 N.W.2d 734, 738 (Mich. Ct. App. 1988), *appeal denied*, 432 Mich. 856 (1989). Thus, as of 1988, Michigan no longer recognized a distinction between theories of implied warranty and negligence in claims of failure to warn, regardless of whether the action was brought against a manufacturer or non-manufacturing seller.[1]

With the *Squibb* court's merger of the theories of negligence and implied warranty for claims of failure to warn, the question remained how a defendant's reasonable care was to be evaluated. The Michigan Supreme Court answered this question in 1992 when it published the second of its two decisions in *Glittenberg v. Doughboy Recreational Industries.*, 491 N.W.2d 208 (Mich. 1992). In a case involving failure-to-warn claims under implied warranty and negligence theories against both manufacturers and sellers, the *Glittenberg* court defined reasonable care in accordance with the principles of Section 388 of the Restatement (2d) of Torts. In completing its gloss on failure-to-warn claims, the *Glittenberg* court made two key rulings. First, it applied Section 388 to both manufacturers and non-manufacturing sellers, like retailers. Second, it applied Section 388 to

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[1] In 1995, the Michigan Supreme Court reaffirmed the continuing vitality of the *Squibb* decision. *See Gregory v. Cincinnati, Inc.*, 538 N.W.2d 325, 329 & n. 9 (Mich. 1995). For this reason, Plaintiff's argument that the Michigan Supreme Court's 1984 decision in *Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176 (Mich. 1984) somehow overruled *Squibb* is nonsensical.

failure-to-warn claims under both negligence and implied warranty theories.

In adopting a unified reasonable care standard for failure-to-warn claims under negligence and implied warranty theories, the Michigan Supreme Court has steadfastly refused to recognize strict liability, absolute liability or any other kind of liability without fault. *See Hickey v. Zezulka*, 487 N.W.2d 106, 122 n.11 (Mich. 1992) ("[T]his Court has not adopted the doctrine of strict products liability."). Plaintiff does not dispute this proposition. Instead, she argues that the Sixth Circuit did not adopt strict liability or liability without fault. She bases her assertion on the court's failure to use the words "strict liability" or "liability without fault." Plaintiff elevates form over substance. The Sixth Circuit actually said that a retailer may be held liable "even if the retailer's conduct is wholly free from negligence." (Pet. Cert. App. at 10a.) It is hard to see how holding a retailer liable even though wholly free from negligence is anything other than liability without fault. Setting aside whether Plaintiff's argument is mere semantics, the simple truth is that the Sixth Circuit held that Hudson's could be liable without proof of negligence when the *Glittenberg* decision demands that Hudson's be held liable only with very specific proof of negligence.

Plaintiff's heavy reliance on the decisions in *Piercefield v. Remington Arms Co*, 133 N.W.2d 129 (Mich. 1965), and *Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176 (Mich. 1984), is misguided. *Piercefield* involved a claim of manufacturing defect, and thus has no relevance to this failure-to-warn case. *Prentis* pertains to Michigan's rejection of strict liability and its adoption of the risk-utility test for all design defect claims. Because both the original and amended opinions concluded that Plaintiff failed the risk-utility test it is difficult to see how the case helps her.

In short, Plaintiff argues only that this Court should deny Hudson's petition only because the Sixth Circuit's decision was consistent with Michigan law. In fact, the Sixth Circuit's

decision is contrary to both the letter and spirit of Michigan law. Given the uniqueness of Michigan's product liability law, the Court should grant the petition to protect Michigan's sovereignty and prevent forum-shopping. Given *Erie*'s undeniable importance, the Court should also grant the petition to issue uniform guidelines that will prevent this kind of injustice from arising in the future.

II. THE SIXTH CIRCUIT CONSIDERED NEW EVIDENCE ON REHEARING

Plaintiff does not challenge the rule that an appellate court cannot consider new evidence, not part of the record, on rehearing. Rather, she argues that the Sixth Circuit did considered new evidence on rehearing because it never said it was doing so. Plaintiff's argument is misplaced.

In its original opinion, the Sixth Circuit court observed that plaintiff's case "basically rests" on her expert's tests. (Pet. Cert. App. at 22a-11.) After examining all of her proof about the tests, it characterized them as "questionable" because they were not conducted under "conditions more like those in Hollister's apartment." (*Id.*) In reaching this conclusion, the court considered and rejected the very same evidence discussed in Plaintiff's original petition for rehearing with the exception of the affidavit. (*Id.*) In its amended opinion, by contrast, the panel characterized the tests as "credible." (*Id.* at 19a.) The only discernible reason for this about-face was the addition of the affidavit attached to Plaintiff's rehearing petition.

Plaintiff now asserts that there was more than enough evidence in the record to show that the tests were conducted under conditions like those at the time of the accident. She points to no such evidence. Certainly the amended opinion identified no such evidence. Indeed, there is no such evidence.

There is a larger concern. Hudson's never had a chance to move to strike the affidavit or question its legitimacy. This

would have been prevented if the court had provided Hudson's with minimum due process. The great virtue of due process is the litigant's certainty that they have been heard and their positions considered. This Court should grant certiorari to establish the minimum requirements for due process on rehearing so that all litigants can enjoy this certainty.

III. THE SIXTH CIRCUIT VIOLATED HUDSON'S DUE PROCESS RIGHTS ON REHEARING.

Because Fed. R. App. P. 40(a)(3) does not provide an absolute right to respond to a petition for rehearing, Plaintiff argues that Hudson's had no due process rights at any stage of the rehearing process. Plaintiff's argument does more to obscure, than clarify, this issue. Hudson's does not claim that Rule 40(a)(3) permits a response to every petition for rehearing. But there is a clear distinction between a decision to rehear and a change in final disposition. In those cases, undoubtedly many, where the decision to grant or deny rehearing is free from doubt, the court should be spared the burden of more paperwork. The demands of due process become imperative, however, once the court decides to rehear the case.

As soon as the court decides to rehear the matter, but before a change in the final disposition, both parties are entitled to notice of the issues under reconsideration and an opportunity to be heard. This is more than a matter of fairness to the litigants; it is also a matter of fairness to the court. By notifying the parties and providing an opportunity to be heard, the court gives them a chance to bring additional matters of fact or law to its attention. This becomes especially important as not all appellate courts receive the complete record from the trial court.

This is not to say that the grant of every petition for a rehearing must necessarily be accompanied by a round of briefs on the issues under reconsideration. In those instances

where an intervening decision by this Court has definitively changed the applicable law, more briefs would be completely unnecessary. *See United States v. Allegheny-Ludlom Indus., Inc.*, 568 F.2d 1073 (5th Cir. 1978) (no response to petition for rehearing before final disposition given intervening definitive Supreme Court decision). But this should be the exception, rather than the rule. Absent some extraordinary circumstance like that found in *Allegheny-Ludlom*, due process requires that the grant of a petition for rehearing be followed by notice to the parties of any issue under reconsideration and a meaningful opportunity to be heard on it. Due process also requires that this occur before any change in final disposition.

Due process never permits what happened in the present case. The Sixth Circuit – on its own initiative – deprived Hudson's of a final judgment without providing notice or the opportunity to be heard on the issue under reconsideration. This Court should grant certiorari so that no future litigant's judgment is taken away without due process.

IV. THE SIXTH CIRCUIT CONSIDERED ON REHEARING A THEORY THAT PLAINTIFF HAD ABANDONED

Plaintiff completely misunderstands Hudson's waiver argument. Hudson's never said that she abandoned her failure-to-warn claim. Instead, Hudson's argued that she abandoned all claims under an implied warranty theory because Plaintiff never included an implied warranty theory in the Pretrial Order.

Plaintiff's excerpts do not refute this conclusion. In the section on contested legal issues, Plaintiff listed, "Did Dayton Hudson have a duty to warn as to the specific nature and magnitude of the risk associated with the clothing it sold?" (Final Joint Pretrial Statement at C-2.) By using the phrase "magnitude of the risk," she was referring to Michigan's risk-utility test. Given that both she and the Sixth Circuit

concluded that her failure-to-warn claim under an implied warranty theory should not be judged by the risk-utility test, it is difficult to see how a reference to that test would preserve any claim under an implied warranty theory.

A similar argument holds for the other excerpt. Hudson's listed as one of its contested legal issues, "Did Hudson's have a duty to warn of the risk that clothing burns?" (*Id.*) On its face, this says nothing about a claim under an implied warranty theory. Indeed, Plaintiff does not contend to the contrary.

Regardless of whether the Sixth Circuit decided the abandonment question or remanded to the trial court on this issue, Hudson's was entitled to be heard. Simple fairness should require it and no harm can come from it. By not asking for briefs from the parties before reversing itself, the Sixth Circuit created precisely the kind of opportunity for error that the rehearing procedure was designed to prevent. This Court should grant this petition and establish the minimum due process requirements on appellate rehearing.

CONCLUSION

The federalism concerns underlying *Erie* and the need for guidelines in ascertaining state law merit the Court's review. Hudson's petition, however, does not stand or fall on these considerations alone. Each year this Court receives thousands of petitions for a writ of certiorari. As the number increases, the chance for review declines. Thus, to an ever-increasing extent, the courts of appeal are courts of last resort. This means that a petition for rehearing is frequently a litigant's last chance for justice. This Court's establishment of minimum due process requirements will go a long way towards ensuring that this last chance is not an empty one.

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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